(12)

Supreme Court U.S.
FILED
FEB 13 2003
OFFICE OF THE CLERK

No. 02-428

IN THE

Supreme Court of the United States

DASTAR CORPORATION,

Petitioner,

v.

TWENTIETH CENTURY FOX FILM CORPORATION,
SFM ENTERTAINMENT LLC, and
NEW LINE HOME VIDEO INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 11, 2002
CERTIORARI GRANTED JANUARY 10, 2003

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The following opinion, findings of fact and conclusions of law and order have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

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RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Court of Appeals Docket #: 00-56712 Filed: 10/17/00
Nsuit: 3820 Copyright (Fed)
Twentieth Century Fx, et al v. Dastar Corporation, et al
Appeal from: Central District of California, Los Angeles

Case type information:
1) civil
2) private
3) (null)

Lower court information:

District: 0973-2 : CV-98-07189-FMC
court reporter: Dawn Bullock, Court Reporter
presiding judge: Florence Marie Cooper, District Judge
Date Filed: 9/2/98
Date order/judgment: 9/15/00
Date NOA filed: 9/28/00

Fee status: paid

Prior cases:
00-55299 null null null
Date filed: 2/17/00 Date disposed: 3/10/00
Disposition: 42b/clk

Current cases:

	Lead	Member	Start	End
companion:				
	00-57158	01-55027	1/9/01	
consolidated:				
	00-56712	01-55027	1/9/01	
	00-56703	01-55027	1/9/01	
	00-56703	00-56712	10/17/00	

related:
00-56703 00-57158 12/19/00

TWENTIETH CENTURY FOX FILM CORPORATION, a Delelware Corporation Plaintiff-counter-defendant - Appellee	Dale M. Cendali FAX 212 212/326-2000 [COR LD NTC ret] O'MELVENY & MEYERS 153 East 53rd Street New York, NY 10022 Seth Alben Aronson, Esq. FAX 213 213/669-6236 Suite 1060 [COR LD NTC ret] O'MELVENY & MYERS, LLP 400 South Hope Street Los Angeles, CA 90071-2899 Neil S. Jahss, Esq. 213/430-6000 [COR LD NTC ret] O'MELVENY & MYERS LLP 400 South Hope Street Los Angeles, CA 90071-2899
SFM ENTERTAINMENT LLC, a Delaware limited liability company Plaintiff-counter-defendant - Appellee	Dale M. Cendali (See above) [COR LD NTC ret] Seth Alben Aronson, Esq. (See above) [COR LD NTC ret]

	Neil S. Jahss, Esq. (See above) [COR LD NTC ret]
NEW LINE HOME VIDEO INC., a New York Corporation Plaintiff-counter-defendant - Appellee	Dale M. Cendali (See above) [COR LD NTC ret] Seth Alben Aronson, Esq. (See above) [COR LD NTC ret] Neil S. Jahss, Esq. (See above) [COR LD NTC ret]
v.	
ENTERTAINMENT DISTRIBUTING, an Oregon Corporation Defendant - Appellant	David A. Gerber, Esq. 805/382-8760 Suite 226 [COR LD NTC ret] 3600 S. Harbor Boulevard Oxnard, CA 93035 Allen Hyman, Esq. FAX 763-4676 818-763-6289 [COR LD NTC ret] LAW OFFICES OF ALLEN HYMAN 10737 Riverside Drive North Hollywood, CA 91602 Anne M. Larsen, Esq. 805/382-8760 Suite 226, Box 513 [COR LD NTC ret]

	D. GERBER LAW OFFICES 3600 South Harbor Boulevard Channel Islands Harbor Oxnard, CA 93035-4136
MARATHON MUSIC & VIDEO, an Oregon Corporation Defendant - Appellant	David A. Gerber, Esq. (See above) [COR LD NTC ret] Allen Hyman, Esq. (See above) [COR LD NTC ret] Anne M. Larsen, Esq. (See above) [COR LD NTC ret]
DASTAR CORPORATION, an Oregon Corporation Defendant-counter-claimant - Appellant	David A. Gerber, Esq. (See above) [COR LD NTC ret] Allen Hyman, Esq. (See above) [COR LD NTC ret] Anne M. Larsen, Esq. (See above) [COR LD NTC ret]
RANDOM HOUSE, INC., Counter-defendant - Appellee	Stephen G. Contopulos, Esq. Suite 4000 [COR LD NTC ret] Bradley H. Ellis, Esq. Suite 4000 [COR LD NTC ret]

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TWENTIETH CENTURY FOX FILM CORPORATION, a Delelware Corporation; SFM ENTERTAINMENT LLC, a Delaware limited liability company; NEW LINE HOME VIDEO INC., a New York Corporation

Plaintiffs-counter-defendants - Appellees

v.

ENTERTAINMENT DISTRIBUTING, an Oregon Corporation; MARATHON MUSIC & VIDEO, an Oregon Corporation;

Defendants - Appellants

DASTAR CORPORATION, an Oregon Corporation;

Defendant-counter-claimant - Appellant

RANDOM HOUSE, INC.,

Counter-defendant - Appellee

* * *

11/29/00	Filed order MOATT (PB) The ct, on its own mtn, consolidates appeals 0-56703 and 0-56712. The following br sch shall govern these consolidated appeals the consolidated opening br is due 1/16/01; the consolidated ans br is due 2/15/01; the optional consolidated rpy br is due within 14 days after service of the consolidated ans br. All parties on a side are

encouraged to join in a single br to the greatest extent practicable. [00-56703, 00-56712] (gva) [00-56703 00-56712]

* * *

1/22/01 Filed parties' joint motion for leave to lodge physical exhibits; served on 1/19/01 ******** FOR MERITS PANEL ********* [4080564] (gva) [00-56703 00-56712]

1/24/01 Filed order Promo: (Deputy Clerk: tah) The parties' joint motion for leave to lodge physical exhibits is referred for disposition to the panel that considers the merits of the case. [4080564-1] [00-56703, 00-56712] (gva) [00-56703 00-56712]

* * *

3/2/01 Filed original and 15 copies Appellant Dastar Corporation's opening brief (Informal: n) 53 pages & 5 Excs in 12 Vols.; served on 3/1/01 [00-56703, 00-56712] (gva) [00-56703 00-56712]

3/14/01 Filed certificate of record on appeal RT filed in DC 11/2/00. (case file) [00-56712] (lu) [00-56712]

* * *

5/3/01 Filed original and 15 copies appellee Random House, Inc. 5 pages brief, served on 5/2/01 [00-56703, 00-56712] (kkw) [00-56703 00-56712]

5/3/01 Filed original & 15 copies Aples' 62 pages brief, 5 Supplemental Excs.; served on 5/2/01 [00-56703, 00-56712] (gva) [00-56703 00-56712]

* * *

5/23/01 Filed order CONFATT (LJE) . . . The Briefing schedule previously set by the court is amended as follows: aplts shall file an opn biref on 7/30/01; aples shall file an ans brief on 9/21/01; aplts may file an opt rpy brief within 14 days . . . Further extension for filing any of the briefs shall require a showing of "extra-ordinary and compelling cirucumstances". Appeal Nos. 00-56703, 00-56712 and 01-55027 are consolidated for argument purposes. . . . [01-55027] (kkw) [01-55027]

6/18/01 Filed original & 15 copies Aplts' reply brief (Informal: n) 31 pages; served on 6/15/01 [00-56703, 00-56712] (gva) [00-56703 00-56712]

* * *

1/11/02 CALENDARED: Pasadena March 12 2002 9:30 a.m. Courtroom 3 [00-56703, 00-56712, 01-55027] (th) [00-56703 00-56712 01-55027]

2/20/02 Received Aplt's additional citations, pursuant to FRAP 28(j); served on 2/19/02 (faxed to Panel) [00-56703, 00-56712, 01-55027] (gva) [00-56703 00-56712 01-55027]

2/28/02 Received Aplts' supplement to additional citations sent on 2/19/02, served on 2/27/02 (faxed to Panel) [00-56703, 00-56712] (gva) [00-56703 00-56712]

3/5/02 Filed order (Deputy Clerk: MD) Aplts' mtn for additional time for oral argument is granted. Oral argument for consolidated appeals Nos. 0-56703 & 56712, scheduled of 3/12/02, in Pasadena, CA shall be limited to 20 minutes per side. Oral argument for appeal 1-55027, scheduled for the same date, shall be limited to 10 minutes per side. [00-56703, 00-56712, 01-55027] (gva) [00-56703 00-56712 01-55027]

3/6/02 Filed order (Alex KOZINSKI): The parties' joint mtn for leave to lodge physical exhibits is granted. [4080564-1] [00-56703, 00-56712, 01-55027] (gva) [00-56703 00-56712 01-55027]

3/8/02 Received Appellant Entertainment Distri in 00-56703, Appellant Entertainment Distri in 00-56712 exhibit. (One original copy served on AK) (Letter regarding exhibits served on panel) (bg) [00-56703 00-56712]

3/12/02 ARGUED AND SUBMITTED TO Alex KOZINSKI, Ronald M. GOULD, Charles R. Breyer [00-56703, 00-56712] (bg) [00-56712]

3/12/02 ARGUED AND SUBMITTED TO Alex KOZINSKI, Ronald M. GOULD, Charles R. Breyer (Cases 00-56703 & 00-56712 argued together) & (Case 01-55027 argued separately) [00-56703, 00-56712, 01-55027] (bg) [00-56712 01-55027]

3/12/02 ARGUED AND SUBMITTED TO Alex KOZINSKI, Ronald M. GOULD, Charles R. Breyer (Cases 00-56703 & 00-56712 argued together) (Case 01-55027 argued separately) [00-56703, 00-56712, 01-55027] (bg) [00-56703 00-56712 01-55027]

4/19/02 FILED MEMORANDUM DISPOSITION: AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART AND REMANDED. No Costs. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Unsigned, Unpublished. Alex KOZINSKI, Ronald M. GOULD, Charles R. Breyer) FILED AND ENTERED JUDGMENT. [00-56703, 00-56712, 01-55027] (gva) [00-56703 00-56712 01-55027]

* * *

5/3/02 [4423686] Received original and 50 copies Appellants Dastar Corporation, Entertainment Distributing, Marathon Music petition, for rehearing with suggestion for rehearing en banc , deficient: appendix to petition not allowed, served on 5/2/02. Notified counsel. (ru) [00-56703 00-56712]

5/3/02 Received Appellants "appendix to petition" to petition for rehearing en banc . (ru) [00-56703 00-56712]

* * *

5/17/02 [4435002] Filed original & 50 copies Aplts Marathon Music & Video & Dastar Corporation petition for rehearing with suggestion for rehearing en banc of 14 pages; served on 5/16/02 (Panel And All Active Judges) [00-56703, 00-56712, 01-55027] (gva) [00-56703 00-56712 01-55027]

5/23/02 Filed Aplts' additional citations, pursuant to FRAP 28(j); served on 5/22/02 (Panel And All Active Judges) [00-56703, 00-56712, 01-55027] [To Panl And All Active Judges: petition for en banc rehearing pending] (gva) [00-56703 00-56712 01-55027]

6/13/02 Filed order (Alex KOZINSKI, Ronald M. GOULD, Charles R. Breyer): The petition for rehearing is denied and the petition for rehearing en banc is rejected. [00-56703, 00-56712, 01-55027] (gva) [00-56703 00-56712 01-55027]

6/26/02 MANDATE ISSUED [00-56703, 00-56712, 01-55027] (gva) [00-56703 00-56712 01-55027]

* * *

1/31/03 Filed Supreme Court order (SC Date: 1/10/03) The ct today entered the foloowing order in the above entitled case: The petition for a writ of certiorari is granted. The br of petitioner is to be filed with the clerk and served upon opposing csl on or before 3 p.m. Friday, 2/14/03. The br of respondent is to be filed with the clerk and served upon opposing csl on or before 3 p.m Monday, 3/10/03. A reply br, if any, is to be filed with the clerk and served upon opposing csl on or before 3 p.m. Monday, 3/24/03. Rule 29.2 does not apply. Justice Breyer took no part in the consideration or decision of this petition. (William Suter, Clerk) (Panel) [00-56703, 00-56712, 01-55027] (gva) [00-56703 00-56712 01-55027]

RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (WESTERN DIV.)

CIVIL DOCKET FOR CASE #: 98-CV-7189

Twentieth Century Fx, et al v. Dastar Corporation, et al

Filed: 09/02/98
Assigned to: Judge Florence-Marie Cooper
Jury demand: Defendant
Referred to: Discovery Charles F. Eick
Demand: $0,000
Nature of Suit: 820
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 17:0101 Copyright Infringement

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware corporation plaintiff	Seth Alben Aronson FAX 213-669-6407 [COR LD NTC] Neil Scot Jahss FTS Ext 6451 FAX 213-430-6407 [COR LD NTC] Marc F Feinstein FAX 213-430-6407 [COR LD NTC] O'Melveny & Myers 400 S Hope St Los Angeles, CA 90071-2899 213-430-6000 Dale M Cendali FTS Ext 2051 FAX 212-326-2061 [COR LD]

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SFM ENTERTAINMENT LLC, a Delaware limited liability company
plaintiff

Seth Alben Aronson
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Marc F Feinstein
(See above)
[COR LD NTC]

Dale M Cendali
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NEW LINE HOME VIDEO INC, a New York corporation
plaintiff

Seth Alben Aronson
(See above)
[COR LD NTC]

Neil Scot Jahss
(See above)
[COR LD NTC]

Marc F Feinstein
(See above)
[COR LD NTC]

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(See above)
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v.

DASTAR CORPORATION, an Oregon corporation
defendant

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MARATHON MUSIC & VIDEO, an Oregon corporation
defendant

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TWENTIETH CENTURY FOX FILM CORPORATION
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SFM ENTERTAINMENT LLC counter-defendant	Seth Alben Aronson (See above) [COR LD NTC] Neil Scot Jahss (See above) [COR LD NTC] Marc F Feinstein (See above) [COR LD NTC] Dale M Cendali (See above) [COR LD]
NEW LINE HOME VIDEO INC counter-defendant	Seth Alben Aronson (See above) [COR LD NTC] Neil Scot Jahss (See above) [COR LD NTC] Marc F Feinstein (See above) [COR LD NTC] Dale M Cendali (See above) [COR LD]

DOUBLEDAY, a division of BANTAM DOUBLEDAY DELL PUBLISHING GROUP INC esa Random House Inc counter-defendant	Stephen G Contopulos FAX 213-896-6600 [COR LD NTC] Sidley Austin Brown & Wood 555 W 5th St, Ste 4000 Los Angeles, CA 90013-1010 213-896-6000

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware corporation; SFM ENTERTAINMENT LLC, a Delaware limited liability company; NEW LINE HOME VIDEO INC, a New York corporation

plaintiff

v.

DASTAR CORPORATION, an Oregon corporation; ENTERTAINMENT DISTRIBUTING, an Oregon corporation; MARATHON MUSIC & VIDEO, an Oregon corporation

defendant

DASTAR CORPORATION;

counter-claimant

TWENTIETH CENTURY FOX FILM CORPORATION; SFM ENTERTAINMENT LLC; NEW LINE HOME VIDEO INC; DOUBLEDAY, erroneously sued as Random House Inc, a division of BANTAM DOUBLEDAY DELL PUBLISHING GROUP INC

counter-defendant

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
9/2/98	1	COMPLAINT filed Summons(es) issued referred to Discovery Charles F. Eick (jp) [Entry date 09/03/98]
		* * *
10/2/98	6	ANSWER filed by defendant Dastar Corporation, defendant Entertainment Distr, defendant Marathon Music to complaint [1-1] (pj) [Entry date 10/06/98]
		* * *
3/29/99	13	FIRST AMENDED COMPLAINT [1-1] by plaintiff. Summons not issued (pj) [Entry date 03/30/99]
		* * *
4/23/99	15	NOTICE OF MOTION AND MOTION by defendant Dastar Corporation, defendant Entertainment Distr to dismiss nd clm for relief for failure to state a clm upon which rel can be granted ; motion hearing set for 10:00 5/17/99 Lodged ord (pj) [Entry date 05/05/99]
5/7/99	16	NOTICE OF WITHDRAWAL by defendant Dastar Corporation, defendant Entertainment Distr, defendant Marathon Music withdrawing motion to dismiss nd clm for relief for failure to state a clm upon which rel can be granted [15-1] (pj) [Entry date 05/10/99]

5/19/99	17	ANSWER to first amended complaint by Dastar Corporation, Entertainment Distributing & Marathon Music & Video [13-1] and COUNTERCLAIM by defendant Dastar Corporation against counterdefendants New Line Video, SFM Entertainment, Twentieth Century Fx; adding counter-defendant Doubleday, a division of Bantam Doubleday Dell Publishing Group Inc, a corporation; jury demand; summons issd on counterclaim (yc) [Entry date 05/25/99]
		* * *
5/28/99	19	FIRST AMENDED ANSWER TO THE FIRST AMENDED CMP [17-1] by defendant Dastar Corporation, defendant Marathon Music; Counterclaim; jury demand; (pj) [Entry date 06/07/99]
6/10/99	20	NOTICE OF MOTION AND MOTION by plaintiffs, counter-defendants to dismiss cntrclms of Dastar Corp ; motion hearing set for 10:00 7/6/99 (jag) [Entry date 06/11/99]
6/10/99	21	DECLARATION of NEIL S JAHSS by plaintiffs, counter-defendant in suppt of motion to dismiss cntrclms of Dastar Corp [20-1] (jag) [Entry date 06/11/99]
		* * *
6/23/99	24	RESPONSE by defendants to motion to dismiss cntrclms of Dastar Corp [20-1] (jag) [Entry date 06/28/99]

6/23/99 25 DECLARATION of JAMES P HABEL by defendants in suppt of opp to motion to dismiss cntrclms of Dastar Corp [20-1] (jag) [Entry date 06/28/99]

* * *

6/25/99 23 NOTICE OF DISMISSAL OF SECOND & THIRD CNTCLM: Cntclmnts Dastar Corp, Ent Distributing & Marathon Music & Video dism with prej the 2nd cntclm fld on 5/28/99 & the 3rd cntclm fld on 5/28/99. by plaintiff pursuant to FRCP 41a(1) Ent : 6/28/99 (pj) [Entry date 06/28/99]

6/29/99 30 REPLY MEMO IN SUPPT by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx to motion to dismiss cntrclms of Dastar Corp [20-1] (pj) [Entry date 07/01/99]

6/29/99 31 REQUEST by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx for judicial notice IN SUPPT motion to dismiss cntrclms of Dastar Corp [20-1] (pj) [Entry date 07/01/99]

6/29/99 32 SUPPL DECLARATION of NEIL S JAHSS IN SUPPT by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Century Fx IN SUPPT motion to dismiss cntrclms of Dastar Corp [20-1] (pj) [Entry date 07/01/99]

* * *

7/6/99 36 ORDER by Judge Dickran Tevrizian This Crt GRANTS Cntdfts' mot to dism Dastar's 5th cntclm for slander of title with PREJ & W/O LV TO AMD; DENIES Cntdfts' mot to dism Dastar's 4th cntclm & GRANTS IN PART Cntdfts' mot to dism Dastar's 1st cnclm, but DENIES the mot to dism remainder of the decl rel cntclm. Cntdfts mot to dism in regards to the 2nd & 3rd cntclms is MOOT as result of Dastar's vol dismissal of these 2 clms with prej. [20-1] (ENT 7/8/99), mld copies & ntc (pj) [Entry date 07/08/99]

* * *

7/8/99 45 DECLARATION of ALLEN HYMAN by defendant, counter-claimant Dastar Corporation, defendant Entertainment Distr, defendant Marathon Music re fur svc of process on Doubleday (jag) [Entry date 07/09/99]

* * *

7/22/99 51 REPLY TO COUNTERCLAIM [17-2] by counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx (jag) [Entry date 07/23/99]

* * *

10/22/99 69 NOTICE OF MOTION AND MOTION by defendant Dastar Corporation, defendant Entertainment Distr, defendant Marathon Music for summary judgment, or in the alt to dismiss for failure to state a clm; motion hearing set for 10:00 11/22/99 Lodged prop stmt, jgm (pj) [Entry date 10/26/99]

10/22/99 70 MEMORANDUM OF P&A IN SUPPORT by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation of for summary judgment [69-1], motion to dismiss for failure to state a clm [69-2] (pj) [Entry date 10/26/99]

10/22/99 71 DECLARATION of ALLEN HYMAN WITH REGARD TO EXH REFRENCED IN THE PROP F&F & CONCLUSIONS OF LAW by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation [69-1], [69-2] (pj) [Entry date 10/26/99]

11/2/99 72 NOTICE OF ERRATA by defendant Marathon Music, defendant Entertainment Distr, defendant, counter-claimant Dastar Corporation correcting motion for summary judgment [69-1] (jag) [Entry date 11/08/99]

11/8/99 73 CROSS NOTICE OF MOTION AND MOTION by plaintiff New Line HomeVideo, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx for summary adjudication of issues; motion hearing set for 10:00 a.m., on 12/6/99 (ca) [Entry date 11/15/99] [Edit date 11/15/99]

11/8/99 74 MEMORANDUM OF PA'S by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx in

opposition to motion for summary judgment [69-1], to motion to dismiss for failure to state a clm [69-2] (ca) [Entry date 11/15/99]

11/8/99 74 MEMORANDUM OF PA'S by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx in support of motion for summary adjudication of issues [73-1] (ca) [Entry date 11/15/99]

11/8/99 75 STATEMENT of uncontroverted facts & conclusions of law in by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx in support of pltfs cross-motn for summary adj of issues [73-1] (ca) [Entry date 11/15/99]

* * *

11/8/99 77 NOTICE of Lodging of materials in oppos to dfts motn for S/J & motn to dism, & in support of pltfs & cntdfts crossmotn for sum adj of issues by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant Entertainment, counter-defendant Twentieth Century Fx. Lodged Exhibit A & B (ca) [Entry date 11/15/99]

11/8/99 78 STATEMENT of Genuine Issues by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx in opposition of motn for s/j [69-1], in oppos of motn to dismiss [69-2] (ca) [Entry date 11/15/99]

11/8/99 79 DECLARATION of Stanley Moger in oppos to by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment,counter-defendant Twentieth Century Fx re motion for summary judgment [69-1], re motion to dismiss for failure to state a clm [69-2] (ca) [Entry date 11/15/99]

11/8/99 79 DECLARATION of Stanley Moger in suppt by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx re motion for summary adjudication of issues [73-1] (ca) [Entry date 11/15/99]

11/8/99 80 DECLARATION of Marc F. Feinstein in oppos by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx re motion for summary

judgment [69-1], re motion to dismiss for failure to state a clm [69-2] (ca) [Entry date 11/15/99]

11/8/99 80 DECLARATION of Marc F. Feinstein in suppt by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx re motion for summary adjudication of issues [73-1] (ca) [Entry date 11/15/99]

11/8/99 81 DECLARATION of Samuel S. Vaughan in oppos by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx re motion for summary judgment [69-1], re motion to dismiss for failure to state a clm [69-2] (ca) [Entry date 11/15/99]

11/8/99 81 DECLARATION of Samuel S. Vaughan in suppt by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx re motion for summary adjudication of issues [73-1] (ca) [Entry date 11/15/99]

11/8/99 82 DECLARATION of Bryan Power in oppos by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line

Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx re motion for summary judgment [69-1], re motion to dismiss for failure to state a clm [69-2] (ca) [Entry date 11/15/99]

11/8/99 82 DECLARATION of Bryan Power in suppt by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx re motion for summary adjudication of issues [73-1] (ca) [Entry date 11/15/99] [Edit date 11/15/99]

11/8/99 83 DECLARATION of Marcy Reed in oppos by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx re motion for summary judgment [69-1], re motion to dismiss for failure to state a clm [69-2] (ca) [Entry date 11/15/99]

11/8/99 83 DECLARATION of Marcy Reed by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx re motion for summary adjudication of issues [73-1] (ca) [Entry date 11/15/99]

11/8/99 84 DECLARATION of Neil S. Jahss in oppos by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth

Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx re motion for summary judgment [69-1], re motion to dismiss for failure to state a clm [69-2] (ca) [Entry date 11/15/99]

11/8/99 84 DECLARATION of Neil S. Jahss in suppt by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx re motion for summary adjudication of issues [73-1] (ca) [Entry date 11/15/99]

11/8/99 85 DECLARATION of Marcy Reed in oppos by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx re motion for summary judgment [69-1], re motion to dismiss for failure to state a clm [69-2] (ca) [Entry date 11/15/99]

11/8/99 85 DECLARATION of Marcy Reed in suppt by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx, counter-defendant New Line Home Video, counter-defendant SFM Entertainment, counter-defendant Twentieth Century Fx re motion for summary adjudication of issues [73-1] (ca) [Entry date 11/15/99] [Edit date 11/15/99]

11/8/99 86 NOTICE OF JOINDER AND JOINDER by counter-defendant Doubleday joining in pltfs oppos to dfts motns for s/j; mot to dism; plts & cnt-dfts cross-motn for sum adj of issues (ca) [Entry date 11/15/99]

11/8/99 94 DECLARATION of JOHN S.D. EISENHOWER IN OPP by plaintiffs re motion for summary adjudication of issues [73-1] (pj) [Entry date 11/18/99]

* * *

11/16/99 88 DECLARATION of ALLEN HYMAN AS THE PRESENTATION OF ADDTL DOCS WHICH GO TO THE CREDIBILITY OF THE PLFS CASE & THEIR WIT by defendant Entertainment Distr, defendant Marathon Music (pj) [Entry date 11/18/99]

11/16/99 90 DECLARATION of ALLEN HYMAN WITH REGARD TO THE PAPERS IN RPLY by defendant Dastar Corporation, defendant Entertainment Distr, defendant Marathon Music (pj) [Entry date 11/18/99]

11/16/99 91 OBJ TO & REQ TO STR CERTAIN OF PLFS' PROFFERED EVID IN OPP by defendant Dastar Corporation, defendant Entertainment Distr, defendant Marathon Music to motion for summary judgment [69-1] (pj) [Entry date 11/18/99]

11/16/99 92 REPLY MEMO by defendant Dastar Corporation, defendant Entertainment Distr, defendant Marathon Music in suppt dfts' motion for summary judgment [69-1] (pj) [Entry date 11/18/99]

11/16/99 93 NTC OF LODGING OF BOOK CRUSADE IN EUROPE (BATES NUMBER CRU 00119 TO CRU 00723) IN SUPPT by defendant Dastar Corporation, defendant Entertainment Distr, defendant Marathon Music to motion for summary judgment [69-1] (pj) [Entry date 11/18/99]

* * *

11/17/99 89 NTC OF LODGING OF BOOK CRUSADE IN EUROPE (BATES NUMBER CRU 00119 TO CHU 00723) by defendant Entertainment Distr, defendant Marathon Music, defendant Dastar Corporation to motion for summary judgment [69-1] (pj) [Entry date 11/18/99]

* * *

11/22/99 95 OPPOSITION by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation to Plfs' motion for summary adjudication of issues [73-1] (pj) [Entry date 11/23/99]

* * *

11/22/99 104 DECLARATION of Allen Hyman by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation re motion for summary judgment [69-1] (bp) [Entry date 12/08/99]

11/22/99 105 DECLARATION of Allen Hyman by defendant with regard to signature of Norman Andersen's decl re motion for summary judgment [69-1] (bp) [Entry date 12/08/99]

11/22/99 106 Defendants' response to plas stmt of UCFL by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation to motion for summary judgment [69-1] (bp) [Entry date 12/08/99]

11/22/99 107 DECLARATION of Allen Hyman by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation with regard to addtl docs obtained from the copyright office re motion for summary judgment [69-1] (bp) [Entry date 12/08/99]

* * *

11/24/99 100 DECLARATION of Norman Andersen in opp by defendant remotion for summary judgment [69-1] (bp) [Entry date 12/08/99]

11/24/99 101 DECLARATION of Lanny Lee Tarter by defendant in opp to motion for summary judgment [69-1] (bp) [Entry date 12/08/99]

11/30/99 96 ORDER OF THE CHIEF JUDGE # 99-232 approved by Judge Terry J. Hatter Pursuant to the recommended procedure adopted by the Court for the creation of the calendar of Judge Florence-Marie Cooper, this case is transferred from the calendar of Judge Dickran Tevrizian to the calendar of Judge Florence-Marie Cooper for all further proceedings. The new case number will now read as CV 98-7189 FMC (Ex) (cc: all counsel) (rn) [Entry date 12/01/99]

12/3/99 99 MINUTES: THis actn has been reassigned to Honorble Florence-Marie Cooper. Case No will now read CV 98-7189FMC(Ex). The PTC and trial are reset at ; pretrial conference on 9:00 2/14/00 ; trial set on 9:00 3/21/00. Pltfs mot for sum jgm/dism will remain as presently set on 12/20/00 at 10:00 by Judge Florence-Marie Cooper CR: none (lk) [Entry date 12/07/99]

12/6/99 110 SUPPLEMENTAL DECLARATION of Neil S Jahss by plaintiff Twentieth Century Fx, plaintiff SFM Entertainment, plaintiff New Line Home Video re motion for summary adjudication of issues [73-1] (bg) [Entry date 12/09/99]

12/6/99 111 DECLARATION of Peter Levathes by plaintiff Twentieth Century Fx, plaintiff SFM Entertainment, plaintiff New Line Home Video in opposition re motion for summary judgment [69-1], motion to dismiss for failure to state a clm and in support [69-2], motion for summary adjudication of issues [73-1] (bg) [Entry date 12/09/99]

12/6/99 112 REPLY MEMORANDUM OF P&A in support by plaintiff Twentieth Century Fx, plaintiff New Line Home Video, defendant Dastar Corporation of motion for summary adjudication of issues [73-1] (bg) [Entry date 12/09/99]

12/6/99 113 REPLY by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx to dft's response to pla's stmt of UFCL to motion for summary adjudication of issues [73-1], motion for

summary judgment [69-1] (bp) [Entry date 12/13/99]

12/6/99 114 REPLY by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx to dft's objections to req to strike certain of pla's proffered evidence in opp to motion for summary judgment [69-1] (bp) [Entry date 12/13/99]

12/6/99 115 Notice of Joinder and Joinder by counter-defendant Random House Inc, sued as Doubleday to rply memo of PA's in support to motion for summary adjudication of issues [73-1] (lk) [Entry date 12/14/99]

12/13/99 116 REQUEST filed by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation to strike No 1 as to addtl evidence presented by pltfs (lk) [Entry date 12/14/99]

12/13/99 117 REQUEST filed by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation to strike certain elements of Pltfs rply memo under Rule 11 (lk) [Entry date 12/14/99]

12/13/99 118 FURTHER DECLARATION of Allen Hyman by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation re exparte motion to strike certain elements of Pltfs rply memo under Rule 11 [117-1], exparte motion to strike No 1 to addtl evidence presented by pltfs [116-1] (lk)[Entry date 12/14/99]

* * *

12/16/99 122 RESPONSE by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx to post-rply subm re plas' cross-mot for s/adj of iss (step) [Entry date 12/28/99]

12/21/99 124 Summary of oral argument by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation and further decl of Allen Hyman purs to FRCP 46(f) re motion for summary judgment [69-1] (lk) [Entry date 01/11/00]

12/22/99 125 Response to by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx to dfts "summary of oral argument" re motion for summary judgment [69-1] (lk) [Entry date 01/11/00]

12/28/99 126 Suggestions by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation on oral arguments by dfts re motion for summary judgment [69-1] (lk) [Entry date 01/11/00]

1/3/00 127 MINUTES: that the motion for summary adjudication ofissues [73-1] is submitted, that the motion for summary judgment [69-1] is submitted. Crt resets the following dates: ; pretrial conference on 9:00 3/13/00 trial set on 8:00 4/25/00 by Judge Florence-Marie Cooper CR: Irene Nakamura (lk) [Entry date 01/11/00]

1/4/00 123 ORDER by Judge Florence-Marie Cooper granting pltfs motion for summary adjudication of issues [73-1], denying dfts motion for summary judgment [69-1], denying dfts

		motion to dismiss for failure to state a clm [69-2] (ENT 1/6/00) ntc. (lk) [Entry date 01/06/00]
1/21/00	128	RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 1/3/2000 (Re:) CR: Irene Nakamura (pjap) [Entry date 01/24/00]
1/21/00	—	TRANSCRIPT filed for proceedings held on 1/3/2000 (pjap) [Entry date 01/24/00]
2/2/00	129	NOTICE OF APPEAL/REPRESENTATION STATEMENT by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation, counter-claimant Dastar Corporation to 9th C/A from Dist. Court ord fld 1/4/00, ent 1/6/00 [123-1] (cc: Allen Hyman; Seth Aronson, O'Melveny & Myers LLP, Los Angeles, CA; Dale M. Cendali, O'Melveny & Myers LLP, New York, NY; Cowan, Liebowitz & Latman, P.C.; Stephen G. Contopulos) Fee: Paid (wdc) [Entry date 02/03/00]
2/4/00	130	ORDER by Judge Florence-Marie Cooper for jury trial, setting ; pretrial conference on 9:00 3/13/00, jury trial set on 9:00 4/25/00 (lk) [Entry date 02/07/00]

* * *

2/18/00	138	EXHIBIT list by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation in lieu of a Joint Exhibit List. (lk) [Entry date 02/22/00]

2/18/00	139	WITNESS list submitted by plaintiff New Line Home Video, plaintiff SFM Entertainment, plaintiff Twentieth Century Fx (lk) [Entry date 02/22/00]
2/18/00	140	PRELIMINARY WITNESS list submitted by defendant & cntclmnt Dastar Corporation, & defendants Entertainment Distr, & Marathon Music (rrey) [Entry date 02/23/00]
2/18/00	141	DECLARATION of Allen Hyman re preparation of the joint exh list by defendant & counter-claimant Dastar Corporation, & defendants Entertainment Distr, & Marathon Music (rrey) [Entry date 02/23/00] [Edit date 02/23/00]
2/22/00	136	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [129-1] 00-55299 (pjap) [Entry date 02/22/00]
2/24/00	142	DECLARATION of Allen Hyman re preparation of the contentions of fact & law by defendant & counter-claimant Dastar Corporation, defendants Entertainment Distr, Marathon Music (rrey) [Entry date 02/25/00]
2/24/00	143	MEMO OF CONTENTIONS OF FACT and LAW by defendant Entertainment Distr, defendant Marathon Music, defendant Dastar Corporation, counter-claimant Dastar Corporation (seal) [Entry date 02/28/00]

* * *

2/25/00	146	Amended MEMO OF CONTENTIONS OF FACT and LAW by defendant Entertainment Distr, defendant Marathon Music, defendant

Dastar Corporation, counter-claimant Dastar Corporation (bg) [Entry date 02/28/00]

* * *

3/14/00 153 ORDER by Judge Florence-Marie Cooper granting exparte motion to cont PTC, trial dates [152-1]; PTC shall be cont to 7/17/00 at 9:00 and trial date shall be cont to 8/8/00 at 9:00. (lk) [Entry date 03/15/00] [Edit date 07/21/00]

3/14/00 154 NOTICE by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation of NinthCircuitOrd of withdraw of Appeal. (lk) [Entry date 03/15/00] [Edit date 03/15/00]

* * *

3/14/00 — LODGED cc 9th CCA Ord: Applnts' "Ntc of W/drawal of App" is construed as mot for vol dism of th app. So construed, mot is GR & th app is dism. Aplles' mot to dism th app is den as moot (00-55299) (FWD TO CRD) (pjap) [Entry date 03/24/00]

3/15/00 156 CERTIFIED COPY of Appellate Court Order: Appellants "Ntc ofW/drawal of appeal" is contrued as a motfor volunt dism of thisappeal. So contrued, that mot is granted and thisappeal is dism. Appellees mot to dism this appeal is den as moot; dismissing the appeal [129-1] Appeal No 00-55299 (ENT 3/17/00) (lk) [Entry date 03/17/00]

* * *

6/9/00 162 NOTICE OF MOTION AND MOTION by plaintiffs to strike dfts jury demand ; motion hearing set for 10:00 6/26/00 (rrey) [Entry date 06/12/00]

6/9/00 163 DECLARATION of Katharine by plaintiff in suppt of motion to strike dfts jury demand [162-1] (rrey) [Entry date 06/12/00]

* * *

6/15/00 166 OPPOSITION by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation, counter-claimant Dastar Corporation to motion to strike dfts jury demand [162-1] (rrey) [Entry date 06/16/00]

6/15/00 167 DECLARATION of Allen Hyman by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar counter-claimant Dastar Corporation in suppt of opp to motion to strike dfts jury demand [162-1] (rrey) [Entry date 06/16/00]

* * *

6/19/00 170 REPLY MEMORANDUM by plaintiffs in suppt of motion to strike dfts jury demand [162-1] (rrey) [Entry date 06/23/00]

6/23/00 171 ORDER by Judge Florence-Marie Cooper granting pltfs motion to strike dfts jury demand [162-1]. For the reasons set forth above (see doc), pltfs mot to str dfts jy demand is granted. (ENT 6/26/00) ntc. (lk) [Entry date 06/26/00]

6/23/00 172 NOTICE OF MOTION AND MOTION by plaintiff in limine #1 to exclude evid of dfts clm costs & expenses ; decl of Katharine Sabich-Robison Lodged Ord ***** FILED UNDER SEAL ***** (rrey) [Entry date 06/26/00]

* * *

6/23/00 173 NOTICE OF MOTION AND MOTION by plaintiffs in limine #2 to exclude all evid introduced to relitigate the validity of the copyright ; decl of Katharine Sabich-Robison Lodged Ord (rrey) [Entry date 06/26/00]

6/23/00 174 NOTICE OF MOTION AND MOTION by plaintiff in limine #3 to exclude all evid relating to affirmative defenses for which dfts prod no discov ; decl of Katharine Sabich-Robison Lodged Ord (rrey) [Entry date 06/26/00]

6/23/00 — PLACED IN FILE - NOT USED p Prop Ord gr pltfs mot to str jy demand of dfts. (lk) [Entry date 06/26/00]

6/30/00 175 NOTICE OF MOTION AND MOTION by defendant, counter-claimant Dastar Corporation, defendants Marathon Music, Entertainment Distr in limine to preclude plfs from submitting evid in suppt of their clm of damages as to clms nos 2 & 3; to limit evid as to plfs Lanham Act & Unfair Competition Clms; mot for summary adjudication of issues as to plfs evid of damages 10:00 7/24/00 (rrey) [Entry date 07/03/00] [Edit date 07/03/00]

6/30/00 175 NOTICE OF MOTION AND MOTION in limine, by defendant, counter-claimant Dastar Corporation, defendants Marathon Music, Entertainment Distr ; in the alt for summary adjudication of issues re plfs clms of damages under both the Lanham Act, & Unfair Competion clms; motion hearing set for 10:00 7/24/00 (rrey) [Entry date 07/03/00]

6/30/00 176 MEMORANDUM IN SUPPORT by defendant, counter-claimant Dastar Corporation, defendants Marathon Music, Entertainment Distr of motion for summary adjudication of issues [175-1], motion in limine to preclude plfs from submitting evid insuppt of their clm of damages as to clms nos 2 & 3; to limit evid as to plfs Lanham Act & Unfair Competition Clms [175-1] (rrey) [Entry date 07/03/00]

6/30/00 177 DECLARATION of Allen Hyman by defendant, counter-claimant Dastar Corporation, defendants Marathon Music, Entertainment Distr in suppt of motion in limine to preclude plfs from submitting evid in suppt of their clm of damages as to clms nos 2 & 3; to limit evid as to plfs Lanham Act & Unfair Competition Clms [175-1], or in the alt motion for summary adjudication of issues [175-1] (rrey) [Entry date 07/03/00]

6/30/00 178 STATEMENT OF FACTS by defendant, counter-claimant Dastar Corporation, defendants Marathon Music, Entertainment Distr w/out substantial controversy as to plfs clms for damages under the Lanham Act, & Unfair Competition in suppt of motion in limine to preclude plfs from submitting evid in suppt of their clm of damages as to clms

nos 2 & 3; to limit evid as to plfs Lanham Act & Unfair Competition Clms [175-1], or in the alt motion for summary adjudication of issues [175-1] (rrey) [Entry date 07/03/00]

6/30/00 — LODGED/PROPOSED ORDER submitted by defendant, counter-claimant Dastar Corporation, defendants Marathon Music, Entertainment Distr. (FWD TO CRD) (rrey) [Entry date 07/05/00]

* * *

7/5/00 181 NOTICE OF MOTION AND MOTION by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation, counter-claimant Dastar Corporation forreconsideration ; motion hearing set for 10:00 7/24/00 (lk) [Entry date 07/10/00]

7/5/00 182 MEMORANDUM IN SUPPORT by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation, counter-claimant Dastar Corporation of motion for reconsideration [181-1] (lk) [Entry date 07/10/00]

7/5/00 183 DECLARATION of Allen Hyman by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar counter-claimant Dastar Corporation in support re motion for reconsideration [181-1] (lk) [Entry date 07/10/00]

* * *

7/13/00 184 OPPOSITION by counter-claimant Dastar Corporation, defendant Dastar Corporation, defendant Entertainment Distr, defendant Marathon Music to motion in limine #3 to exclude all evid relating to affirmative defenses for which dfts prod no discov [174-1] & to motion in limine #2 to exclude all evid introduced to relitigate the validity of the copyright [173-1] (yl) [Entry date 07/14/00]

7/13/00 185 NOTICE OF LODGING by defendants Marathon Music, Entertainment Distr, Dastar Corporation, counter-claimant Dastar Corporation in opp to motion in limine #1 to exclude evid of dfts clm costs & expenses [172-1] ; ldg depo exhs (1 binder) FWD TO CRD (rrey) [Entry date 07/14/00]

7/13/00 186 MEMORANDUM OF P/A IN OPPOSITION by plaintiffs in opp to Dfts motion for reconsideration [181-1] (ad) [Entry date 07/14/00]

7/13/00 187 DECLARATION of Michael Palgon by plaintiffs in opp to Dfts motion for reconsideration [181-1] (ad) [Entry date 07/14/00] [Edit date 07/14/00]

7/13/00 188 DECLARATION of Neil S Jahss by plaintiffs in opp to Dfts motion for reconsideration [181-1] (ad) [Entry date 07/14/00]

7/13/00 189 MEMORANDUM OF P/A IN OPPOSITION by plaintiffs to Dfts motion in limine to preclude plfs from submitting evid in suppt of their clm of damages as to clms nos 2 & 3; to limit evid as to plfs Lanham Act

& Unfair Competition Clms[175-1], & in the alt for summary adjudication of issues [175-1] (ad) [Entry date 07/14/00]

7/13/00 190 STATEMENT OF GENUINE ISSUES by plaintiffs in opp to Dfts motion in limine to preclude plfs from submitting evid in suppt of their clm of damages as to clms nos 2 & 3; to limit evid as to plfs Lanham Act & Unfair Competition Clms [175-1], & in the alt for summary adjudication of issues [175-1] (ad) [Entry date 07/14/00]

7/13/00 191 DECLARATION of Katharine Sabich-Robison by plaintiffs in opp to Dfts motion in limine to preclude plfs from submitting evid in suppt of their clm of damages as to clms nos 2 & 3; to limit evid as to plfs Lanham Act & Unfair Competition Clms [175-1], & in the alt for summary adjudication of issues [175-1] (ad) [Entry date 07/14/00]

7/13/00 192 NOTICE OF LODGING by defendants Marathon Music, Entertainment Distr, Dastar Corporation, counter-claimant Dastar Corporation of depo of Stephen Hebert in opp to motion in limine #1 to exclude evid of dfts clm costs & expenses [172-1] (rrey) [Entry date 07/14/00]

* * *

7/13/00 196 NOTICE OF JOINDER & JOINDER by counter-defendant Doubleday joining motion opposition to dfts mot for recon [186-1] (rrey) [Entry date 07/17/00]

7/17/00 197 REPLY by dfts and cntclmnts Marathon Music, Entertainment Distr, Dastar Corporation to response to motion in limine to preclude plfs from submitting evid in suppt of their clm of damages as to clms nos 2 & 3; to limit evid as to plfs Lanham Act Unfair Competition Clms [175-1] (lk) [Entry date 07/19/00]

7/17/00 198 REPLY MEMO by plaintiff New Line Home Video, plaintiff SFMEntertainment, plaintiff Twentieth Century Fx in support of its motion in limine #2 to exclude all evid introduced to relitigate the validity of the copyright [173-1], motion in limine #3 to exclude all evid relating to affirmative defenses for which dfts prod no discov [174-1] (lk) [Entry date 07/19/00]

7/17/00 199 REPLY by defendants and cntclmnts Marathon Music, Entertainment Distr, Dastar Corporation in support of motion for reconsideration [181-1] (lk) [Entry date 07/19/00]

7/17/00 200 FRCP 56(f) DECLARATION of Allen Hyman by defendants and cntclmnts Marathon Music, Entertainment Distr, Dastar Corporation re motion for summary of issues [175-1] (lk) [Entry date 07/19/00]

7/18/00 204 DECLARATION of Allen Hyman by defendants Marathon Music, Entertainment Distr, dft & counter-claimant Dastar Corporation re preparation of the PTC Ord (rrey) [Entry date 07/19/00]

7/18/00 205 OBJECTIONS filed by defendants Marathon Music, Entertainment Distr, defendant & counter-claimant Dastar Corporation to plfs exhs (rrey) [Entry date 07/19/00]

* * *

7/20/00 207 ORDER by Judge Florence-Marie Cooper denying dfts motion for reconsideration [181-1]. (ENT 7/20/00). ntc (rrey) [Entry date 07/21/00]

* * *

7/24/00 210 MINUTES: plfs motion in limine #1 to exclude evid of dfts clm costs & expenses [172-1] ; motion in limine #2 to exclude all evid introduced to relitigate the validity of the copyright [173-1] ; motion in limine #3 to exclude all evid relating to affirmative defenses for which dfts prod discov [174-1] ; dfts motion in limine preclude plfs from submitting evid in suppt of their clm of damages as to clms nos 2 & 3; to limit evid as to plfs Lanham Act & Unfair Competition Clms [175-1] ; motion for summary adjudication of issues [175-1] are taken UNDER SUBMISSION ; Crt will mod & sign the propsd PTC Ord; Crt trial remains set for 8/9/00 by Judge Florence-Marie Cooper CR: Pat Cuneo (rrey) [Entry date 07/28/00]

7/24/00 212 MINUTES: Plfs motion in limine #1 to exclude evid of dfts clm costs & expenses [172-1] ; motion in limine #2 to exclude all evid introduced to relitigate the vaiidity of the copyright [173-1] ; motion in limine #3

to exclude all evid relating to affirmative defenses for which dfts prod discov [174-1]; dfts the motion for summary adjudication of issues [175-1]; & in limine to preclude plfs from submitting evid in suppt of their clm of damages as to clms nos 2 & 3; to limit evid as to plfs Lanham Act & Unfair Competition Clms [175-1] are TAKEN UNDER SUBMISSION; Crt will mod & sign the propsd PTC Ord; Crt trial remains set for 8/8/00 by Judge Florence-Marie Cooper Pat Cunico (rrey) [Entry date 07/31/00]

7/26/00 209 STATEMENT OF COUNSEL by defendants Marathon Music, Entertainment Distr, dft & cntclmnt Dastar Corporation re PTC Ord (rrey) [Entry date 07/26/00]

* * *

8/2/00 213 TRIAL briefs submitted by defendants, counter-claimant (rrey) [Entry date 08/03/00]

* * *

8/4/00 215 EX PARTE APPLICATION filed by plaintiffs to quash subp as to plaintiffs ; decl of Neil S Jahss Lodged Propsd Ord (rrey) [Entry date 08/04/00]

* * *

8/7/00 218 EX PARTE APPLICATION filed by plaintiffs New Line Home Video, SFM Entertainment & Twentieth Century Fx to quash subpoena as to Twentieth Century Fx paralegal Marcy Reed; Memo of P/A's; Decls of David Berke,

Katharine Sabich-Robison & Neil S. Jahss; Lodged Ord (yl) [Entry date 08/09/00]

* * *

8/8/00 220 AMENDED EXHIBIT LIST by defendants Dastar Corporation, Entertainment Distr, Marathon Music, counter-claimant Dastar Corporation (jp) [Entry date 08/10/00]

* * *

8/8/00 222 EX PARTE APPLICATION filed by plaintiffs Twentieth Century Fx, SFM Entertainment, New Line Home Video to exclude trial testimony by declaration & undisclosed evidence; Decl of Neil S. Jahss; Lodged order (jp) [Entry date 08/10/00]

8/8/00 223 OPPOSITION by plaintiffs Twentieth Century Fx, SFM Entertainment, New Line Home Video to dfts attempt to resurrect previously withdrawn subpoenas (jp) [Entry date 08/10/00]

* * *

8/8/00 224 EXHIBIT LIST by plaintiffs Twentieth Century Fx, SFM Entertainment, New Line Home Video in lieu of a joint exhibit list (jp) [Entry date 08/10/00]

* * *

8/9/00 219 MINUTES: 1st day trial, ; trial cont to 8/10/00 no time given. Wits sworn; Exh identified; case continued by Judge Florence-

Marie Cooper CR: Pat Cuneo (lk) [Entry date 08/10/00]

* * *

8/10/00 227 MINUTES: 2nd day court trial. WIts called, sworn & test. Exh identified trial cont to 8/11/00 (no time given) by Judge Florence-Marie Cooper CR: Pat Cuneo (lk) [Entry date 08/11/00]

8/11/00 228 MINUTES: 3rd day court trial. WIts called, sworn and testified. Exh ident and admitted. Ptys rest. Closing argument made. Submitted. trial held end, by Judge Florence-Marie Cooper CR: Pt Cuneo (lk) [Entry date 08/14/00]

* * *

8/11/00 230 WITNESS list submitted by plaintiffs (rrey) [Entry date 08/18/00]

8/11/00 231 AMENDED EXHIBIT list by defendants (rrey) [Entry date 08/18/00]

8/29/00 232 FINDINGS OF FACT and CONCLUSIONS OF LAW by Judge Florence-Marie Cooper; Plf is instructed to parepare a Judgment for the Crt's signature w/in 10 days of the issuance of this Order (see doc for fur detail) (ENTERED: 8/30/00) (SEND NTC) (jp) [Entry date 08/30/00]

8/29/00 233 REQUEST by defendants, counter-claimants Dastar Corp, Entertainment Distr, Marathon Music to move exhibits into evidence at trial (jp) [Entry date 08/30/00]

8/29/00 234 RESPONSE by plaintiffs Twentieth Century Fx, SFM Entertainment, New Line Home Video request to move exhibits into evidence at trial [233-1] (jp) [Entry date 08/30/00]

* * *

8/30/00 — PLACED IN FILE – NOT USED; Dfts (Propsd) findings of fact and concl of law ldg on 8/2/00 (rrey) [Entry date 09/07/00]

9/8/00 — LODGED/PROPOSED JGM re clms asserted by and agnst plfs submitted by plaintiffs. (FWD TO CRD) (rrey) [Entry date 09/08/00]

9/11/00 235 JUDGMENT AND ORDER: by Judge Florence-Marie Cooper : Bench trial hld; defts Dastar Corporation, Entertainment Distr, Marathon Music shal pay plf $1,717,213.66 ($150,00 in statutory damages und cpyrt act & $1,567,213.66 und Lathan Act) plus post jdmt int at legal rate until paid; plf may file mot for atty fees & costs; if crt grans usch mot, jdmt shl be amd to reflect amt of plf award; and rendering permanent injunction agst defts re mfg, cpy, sell etc of re elements of orig subj matter contained in or for tkg credit as its own creation the bk "Crusade in Europe", w/i 30 days of ent of jdmt, defts deliver/surrencer to plfs all negatives, film, video etc that infringe on plf rits und cpyrts to bk; w/i 30 days of ent of jdmt defts file w/crt & srv on plf a rpt in writing und othat re compliance w/inj; defts shl tk nothing and their cntclms dism on merits w/prej as are all defts affirm defenses

and terminating case (MD JS-6) (ENT 9/13/00) send/ntcs (lc) [Entry date 09/13/00]

* * *

9/13/00 238 JUDGMENT AND ORDER: by Judge Florence-Marie Cooper against counter-defendant Randon House sued as Doubleday, Dft sakk taje nothing and their counterclm agnst Randon House for declar relief, intentinal misrepresentation negligent misrepresentation unfair competition and slander ot tilte are dism on the merits and w/prej. Counter dft Random House may file a mot for attys fees and costs if the crt grants such mot, this judgment shall be amd to reflect the amnt of of Ramdom House' award and the crt shll retain jurisdiction to reforce this judgment. (ENTER 9/15/00)case closed. (cc: all counsel) (yc) [Entry date 09/15/00] [Edit date 09/15/00]

* * *

9/14/00 248 RECEIPT OF TRANSCRIPT of proceedings for the following date: 7/24/00 CR: Pat Cuneo (wdc) [Entry date 09/20/00]

9/14/00 — TRANSCRIPT filed for proceedings held on 7/24/00 (wdc) [Entry date 09/20/00]

9/15/00 240 EX PARTE APPLICATION filed by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation, counter-claimant Dastar Corporation for an order req that the Jgm be vac to consider objs of dfts ; dfts objs to the form of the (Propsd) Jgm; Lodged Propsd Ord (rrey) [Entry date 09/18/00]

9/15/00 241 DECLARATION of Allen Hyman by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar counter-claimant Dastar Corporation in suppt of exparte appl for an order req that the Jgm be vac to consider objs of dfts [240-1] (rrey) [Entry date 09/18/00]

9/15/00 — PLACED IN FILE - NOT USED; (Propsd) Ord on ex parte appl ldg by dfts, & cntclmnts on 9/12/00 (rrey) [Entry date 09/19/00]

9/15/00 247 ORDER by Judge Florence-Marie Cooper denying exparte motion for setting a briefing sched on plas' mot to-be-fld for attys fees [236-1] the deadline for pla to fl/src mot for attys fees is 9/27/00, hrng on mot is to be 11/6/00. To the extent that dfts wish to stay execution of the jgm against them, they must post: (1) a bond in an amount equal to 125% of the jgm against them, (2) a bond in an amount equal to 135% of any fee and costs award, and (3) a cost bond in the amount of $250,000 (bp) [Entry date 09/19/00] [Edit date 10/13/00]

9/18/00 242 EX PARTE APPLICATION filed by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation, counter-claimant Dastar Corporation to vacate 2nd Jgm in favor of Random House ; & fur appl to vac the 1st Jgm, in that there is no final Jgm under Rule 54 (b) Lodged propsd Ord (rrey) [Entry date 09/19/00]

* * *

9/18/00 245 OBJECTIONS filed by defendant Marathon Music, defendant Entertainment Distr, defendant Dastar Corporation, counter-claimant Dastar Corporation to judgment [238-1] (rrey) [Entry date 09/19/00]

* * *

9/18/00 249 RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 8/9/00, 8/10/00, 8/11/00 CR: Pat Cuneo (wdc) [Entry date 09/20/00]

9/18/00 — TRANSCRIPT filed for proceedings held on 8/9/00 (wdc) [Entry date 09/20/00]

9/18/00 — TRANSCRIPT filed for proceedings held on 8/10/00 (wdc) [Entry date 09/20/00]

9/18/00 — TRANSCRIPT filed for proceedings held on 8/11/00 (wdc) [Entry date 09/20/00]

* * *

9/19/00 251 CONSOLIDATE OPPOSITION by plaintiffs to exparte appl for an order req that the Jgm be vac to consider objs of dfts [240-1]; & to dfts objs to the form of the (Propsd) Jgm and Fur Appl ot vac the 1st Jgm in that there is no Final Jgm under Rule 54(B) (rrey) [Entry date 09/21/00]

9/21/00 252 MINUTES: The Crt has read and considered dfts exparte appl to vacate 2nd Jgm in favor of Random House [242-1], & exparte appl for an order req that the Jgm be vac to consider objs of dfts [240-1] ; there is not merit to dfts objs to either Jgm, and the objs

are OVERRULED by Judge Florence-Marie Cooper CR: Not Present (rrey) [Entry date 09/22/00]

* * *

9/27/00 253 NOTICE OF MOTION AND MOTION by plaintiffs for attorney fees, & costs under the Copyright and Lanham Acts; motion hearing set for 10:00 11/6/00 (rrey) [Entry date 09/28/00]

9/27/00 254 MEMORANDUM OF P/A IN SUPPORT by plaintiffs of motion for attorney fees [253-1], & costs [253-2] (rrey) [Entry date 09/28/00]

9/27/00 255 DECLARATION of Neil S Jahss by plaintiffs in suppt of motion for attorney fees [253-1], & costs [253-2] (rrey) [Entry date 09/28/00]

9/27/00 256 DECLARATION of Daphne Gronich by plaintiffs in suppt of motion for attorney fees [253-1], & costs [253-2] (rrey) [Entry date 09/28/00]

9/27/00 257 DECLARATION of Katharine Sabich-Robison by plaintiffs in suppt of motion for attorney fees [253-1], & costs [253-2] (rrey) [Entry date 09/28/00]

9/28/00 258 NOTICE OF APPEAL by defendants Dastar Corporation, Entertainment Distr, Marathon Music to 9th C/A from Dist. Court jgm ent 9/13/00 [235-3] (cc: Allen Hyman; O'Melveny & Meyers; O'Melveny & Myers; Cowan, Liebowitz & Latman; Stephen G. Contopulos) Fee: Paid. (ghap) [Entry date 09/28/00]

9/28/00 259 NOTICE OF APPEAL by defendants Dastar Corporation, Entertainment Distr, Marathon Music to 9th C/A from Dist. Court jgm ent 9/15/00 [238-1] (cc: Allen Hyman; O'Melveny & Meyers; O'Melveny & Meyers; Cowan, Liebowitz & Latman; Stephen G. Contopulos) Fee: Paid (ghap) [Entry date 09/28/00]

* * *

10/5/00 263 NOTICE TO CLERK that Reporter's Transcripts are Complete & Have Been Filed in this case & That the Record is Complete For Purposes of Certification re appeal [259-1] (pjap) [Entry date 10/05/00]

* * *

10/18/00 266 NOTIFICATION by Circuit Court of Appellate Docket Number appeal [258-1] 00-56703 (pjap) [Entry date 10/18/00]

10/18/00 268 DECLARATION of Allen Hyman by defendants & counter-claimiaints Marathon Music, Entertainment Distr & Dastar Corporation Re Facsimile Decl of Steve Hebert to Demonstrate Compliance w/the Jgm of the Crt ent 9/13/00 (yl) [Entry date 10/19/00]

10/19/00 267 NOTIFICATION by Circuit Court of Appellate Docket Number appeal [259-1] 00-56712 (ghap) [Entry date 10/19/00]

10/19/00 269 TRANSCRIPT DESIGNATION and ordering form for dates: 1/11/99 CR: C. Ciszowski; 7/6/99 Lori Muraoka ; 1/3/00; 7/24/00; 08/09/00; 8/10/00; 8/11/00 CR: Pat Cuneo re transcript [249-1], re transcript [248-1],

re transcript [49-1] (ghap) [Entry date 10/20/00]

10/20/00 270 DECLARATION of Steve Hebert by defendants Marathon Music, Entertainment Distr, & dft, counter-claimant Dastar Corporation to demonstrate compliance w/ the Jgm of the Crt entered 9/13/00 (rrey) [Entry date 10/20/00]

* * *

10/30/00 278 OPPOSITION by defendants, counter-claimant to motion for attorney fees [253-1], & costs [253-2] (rrey) [Entry date 11/01/00]

10/30/00 279 OPPOSITION by defendants, counter-claimant to motion for attorney fees [262-1], & costs [262-2] (rrey) [Entry date 11/01/00]

* * *

11/20/00 283 REPLY MEMORANDUM by plaintiff in supp of motion for attorney fees [253-1], & costs [253-2] (rrey) [Entry date 11/28/00]

* * *

11/20/00 285 DECLARATION of Kerry Lyon by plaintiffs in suppt of motion for attorney fees [253-1], & costs [253-2] (rrey) [Entry date 11/28/00]

* * *

11/27/00 287 FINDINGS of fact and conclusions of law re award of plfs attys fees & costs by Judge

Florence-Marie Cooper; Plfs award of attys fees totals $1,481,898.00 (including those fees incurred through 11/8/00) (ENT 11/28/00) (SEND/NTC) (rrey) [Entry date 11/28/00]

* * *

12/27/00 299 NOTICE OF APPEAL by defendant Dastar Corporation, defendant Entertainment Distr, defendant Marathon Music & Video to 9th C/A from Dist. Court Jgmt on award of atty fees fld 11/30/00 & ent 12/20/00 [298-1] (cc: Allen Hyman; O;melveny & Myers; Dale M. Cendali; Cowan, Liebowitz & Latman; Stephen G. Contopulos all parties) Fee: Paid (weap) [Entry date 12/27/00]

1/10/01 300 NOTIFICATION by Circuit Court of Appellate Docket Number appeal [299-1] 01-55027 (pjap) (pjap) [Entry date 01/10/01]

* * *

1/26/01 305 9th CCA Ord: Ptys' joint mot for lv to lodge physical exhs is ref for dispo to panel that considers merits of case. (00-56703, 00-56712) (pjap) [Entry date 01/31/01]

* * *

2/22/01 307 TRANSCRIPT DESIGNATION and ordering form for dates: None requested (weap) [Entry date 02/22/01]

3/2/01 308 CERTIFICATE of Record Transmitted to USCA (01-55027) (cc:all parties) (pjap) [Entry date 03/02/01]

3/2/01 309 CERTIFICATE of Record Transmitted to USCA (00-56703) (cc:all parties) (pjap) [Entry date 03/02/01]

3/14/01 310 CERTIFICATE of Record Transmitted to USCA (00-56712) (cc:all parties) (pjap) [Entry date 03/14/01]

* * *

3/11/02 314 ORDER FROM USCA: Ptys' joint mot for lv to lodge physical exhibits is GR. (00-56703, 00-56712, 01-55027) (pjap) [Entry date 03/14/02]

3/11/02 315 ORDER FROM USCA: Applnts' mot for addtl time for oral argument GR. Oral argument for consol apps nos. 00-56703 & 00-56712 sched for 3/12/02 in Pasadena, CA, shall be ltd to 20 mins per side. Oral argument for app no. 01-55027, sched for same date shall be ltd to 10 mins per side. (00-56703, 00-56712, 01-55027) (pjap) [Entry date 03/15/02]

6/17/02 316 ORDER FROM USCA: The petn for rehearing is den & petn for rehearing en banc is rejected. (00-56703, 00-56712, 01-55027) (cbr) [Entry date 06/21/02]

6/28/02 — LODGED CC 9TH CCA JGM of said Dist Crt affrm in part, reversed in part, vacated in part & rmd. (FWD TO CRD) (00-56703; 00-56712; 01-55027) (wdc) [Entry date 07/18/02]

7/2/02 317 CERTIFIED COPY of Appellate Court Order: affirmed in part, reversed in part, vacated in

part and remanding the Decision of the District Court [Appeal (bp) [Entry date 07/03/02]

7/2/02 318 MANDATE from Circuit Court of Appeals filing and spreading the remanding, affirming in part, reversing in part; vacated in part. The request for certificate of appealability is denied. Status conference on remand set on July 31, 2002, at 2:30 p.m. (bp) [Entry date 07/03/02]

* * *

10/11/02 354 MINUTES: 1st day court trial held; witnesses called, sworn & testified; exhibits identified; exhibits admitted; plaintiff rest defendant Dastar rest; closing arguments made by both parties; court asks for further briefs to be limited to 35 pages each. Exhibits are admitted pursuant to stipulation and order re authenticity, etc. filed on 10/10/02 by Judge Florence-Marie Cooper CR: Pat Cuneo (bp) [Entry date 10/15/02]

* * *

12/30/02 363 FINDINGS of fact and conclusions of law by Judge Florence-Marie Cooper (pj) [Entry date 01/02/03]

12/30/02 364 RULINGS ON EVIDENTIARY OBJECTIONS: The Court determines that the book, Crusade in Europe, was a work for hire and awards Jgm to plfs by Judge Florence-Marie Cooper (pj) [Entry date 01/02/03]

* * *

1/17/03 366 STIPULATION and ORDER that all proceedings in the District Court, except for any proceedings in connection with counter-defendant Random House, Inc.'s ex parte application for clarification of the findings of fact and conclusions of law entered by the District Court on January 2, 2003, shall be stayed while the Lanham Act portion of the case is pending in the Supreme Court. The stay shall expire on the day the clerk of the Supreme Court issues its judgment or mandate. Within ten days of the issuance of the judgment or mandate of the Supreme Court, plaintiffs and counterdefendants shall prepare a proposed judgment, as instructed in the District Court's January 2, 2003 findings and conclusions. Plaintiffs and counterdefendants may then file motions for attorney's fees and costs, as stated in the court's findings and conclusions by Judge Florence-Marie Cooper (bp) [Entry date 01/21/03]

* * *

1/31/03 368 CLERK'S record on appeal transmitted to U. S. Supreme Court [259-1] vols: 26; 6 folders of docket nos. 83, 84, 85, 255, 257 & 285; transcripts: 9 (Not included: Docket No. 326) (00-56703) (02-428) (pjap) [Entry date 01/31/03]

1/31/03 369 CLERK'S record on appeal transmitted to U. S. Supreme Court [259-1] 11 sealed envelopes - docket nos. 120, 121, 144, 172, 193, 194, 195, 201, 202, 211 & 214) (00-56703) (02-428) (pjap) [Entry date 01/31/03]

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 13, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER

No. 00-56703

D.C. No. CV-98-07189-FMC
Central District of California,
Los Angeles

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation; SFM ENTERTAINMENT LLC, a Delaware limited liability company; NEW LINE HOME VIDEO INC., a New York Corporation,

Plaintiffs-counter-defendants - Appellees,

v.

ENTERTAINMENT DISTRIBUTING, an Oregon Corporation; MARATHON MUSIC & VIDEO, an Oregon Corporation,

Defendants - Appellants,

DASTAR CORPORATION, an Oregon Corporation,

Defendant-counter-claimant -, Appellant,

RANDOM HOUSE, INC.,

Counter-defendant - Appellee.

No. 00-56712

D.C. No. CV-98-07189-FMC
Central District of California,
Los Angeles

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation; SFM ENTERTAINMENT LLC, a Delaware limited liability company; NEW LINE HOME VIDEO INC., a New York Corporation,

Plaintiffs-counter-defendants - Appellees,

v.

ENTERTAINMENT DISTRIBUTING, an Oregon Corporation; MARATHON MUSIC & VIDEO, an Oregon Corporation,

Defendants - Appellants,

DASTAR CORPORATION, an Oregon Corporation,

Defendant-counter-claimant -, Appellant,

RANDOM HOUSE, INC.,

Counter-defendant - Appellee.

No. 01-55027

D.C. No. CV-98-07189-FMC
Central District of California,
Los Angeles

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation; SFM ENTERTAINMENT LLC, a Delaware limited liability company; NEW LINE HOME VIDEO INC., a New York Corporation,

Plaintiffs-counter-defendants - Appellees,

v.

ENTERTAINMENT DISTRIBUTING, an Oregon Corporation; MARATHON MUSIC & VIDEO, an Oregon Corporation,

Defendants - Appellants,

DASTAR CORPORATION, an Oregon Corporation,

Defendant-counter-claimant -, Appellant,

RANDOM HOUSE, INC., sued as Doubleday, a division of Bantam Doubleday Dell Publising Group, Inc.,

Counter-defendant - Appellee.

Before: KOZINSKI and GOULD, Circuit Judges, and BREYER, District Judge.*

The petition for rehearing is denied and the petition for rehearing en banc is rejected. Fed. R. App. P. 35; Fed. R. App. P. 40.

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* The Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

**EXCERPTS FROM
ORDER LIST: 537 U.S.
DATED JANUARY 10, 2003
CERTIORARI GRANTED**

* * *

02-428 DASTAR CORPORATION V. TWENTIETH CENTURY FOX FILM

The petition for a writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 14, 2003. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 10, 2003. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 24, 2003. Rule 29.2 does not apply. Justice Breyer took no part in the consideration or decision of this petition.

* * * *

**FIRST AMENDED COMPLAINT FOR COPYRIGHT
AND LANHAM ACT INFRINGEMENT,
AND UNFAIR COMPETITION**

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Case No. 98-7189 DT (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, and NEW LINE HOME VIDEO, INC., a New York corporation,

Plaintiffs,

v.

DASTAR CORPORATION, an Oregon corporation, ENTERTAINMENT DISTRIBUTING, an Oregon corporation, and MARATHON MUSIC & VIDEO, an Oregon corporation,

Defendants.

**FIRST AMENDED COMPLAINT FOR COPYRIGHT
AND LANHAM ACT INFRINGEMENT,
AND UNFAIR COMPETITION**

Plaintiffs TWENTIETH CENTURY FOX FILM CORPORATION ("FOX"), SFM ENTERTAINMENT LLC ("SFM"), and NEW LINE HOME VIDEO, INC. ("NEW LINE"), by their attorneys, O'Melveny & Myers LLP, for their First Amended Complaint, allege as follows:

JURISDICTION AND VENUE

1. This action asserts claims arising under the Copyright Act of 1976, as amended, 17 U.S.C. §§ 101 *et seq.*, the Trademark Act of July 5, 1946, as amended, 15 U.S.C. §§ 1051 *et seq.*, California Business and Professions Code §§ 17200 *et seq.* and §§ 17500 *et seq.*, and California common law. Accordingly, this Court has subject matter jurisdiction over Plaintiffs' federal claims pursuant to 15 U.S.C. § 1121, 28 U.S.C. §§ 1331 and 1338(a) and (b), and over Plaintiffs' state law claims based on principles of pendent jurisdiction.

2. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a), in that it is a civil action between citizens of different states in which the matter in controversy exceeds, exclusive of costs and interest, seventy-five thousand dollars.

3. This Court has personal jurisdiction over DASTAR CORP., ENTERTAINMENT DISTRIBUTING, and MARATHON MUSIC & VIDEO (hereinafter collectively referred to as "Defendants") as they conduct continuous, systematic and routine business within the state. This court also has personal jurisdiction over Defendants as they have committed tortious acts within the state, and/or have committed tortious acts outside California causing injury within the state and derive substantial revenue from interstate commerce.

4. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b), 1391(c) and 1400(a).

THE PARTIES

5. Plaintiff FOX is a Delaware corporation having offices and a principal place of business at 10201 West Pico Boulevard, Los Angeles, California 90035. It is doing business within the jurisdiction of this Court.

6. Plaintiff SFM is a Delaware limited liability company having offices and a principal place of business at 1180 Avenue of the Americas, New York, New York 10036. It is doing business within the jurisdiction of this Court.

7. Plaintiff NEW LINE is a New York corporation having offices and a principal place of business at 888 7th Avenue, 20th Floor, New York, New York 10106. It is doing business within the jurisdiction of this Court.

8. Upon information and belief, defendant DASTAR CORP. is and was at all times relevant hereto, an Oregon corporation with its principal place of business at 2480 W. 7th Place, Eugene, Oregon 97402. It is doing business within the jurisdiction of this Court.

9. Upon information and belief, defendant ENTERTAINMENT DISTRIBUTING is and was at all times relevant hereto, an Oregon corporation with its principal place of business at 2480 W. 7th Place, Eugene, Oregon 97402. It is doing business within the jurisdiction of this Court.

10. Upon information and belief, defendant MARATHON MUSIC & VIDEO is and was at all times relevant hereto, an Oregon corporation with its principal place of business at 2480 W. 7th Place, Eugene, Oregon 97402. It is doing business within the jurisdiction of this Court.

11. The acts complained of herein arose out of the same transaction, occurrence or series of transactions or occurrences, and there are questions of law and fact common to all plaintiffs that will arise in this action. Therefore, the interests of justice will be advanced, and a multiplicity of actions avoided, by the joinder in this action of the claims asserted by each of the plaintiffs.

NATURE OF THE ACTION

12. This action arises out of Defendants' blatant copying of the video documentary series *Crusade in Europe*, owned and/or distributed by Plaintiffs, which is based on General Dwight D. Eisenhower's widely acclaimed memoirs of the same name (the "Eisenhower Book"). By copying, repackaging, and selling the video documentary series under the title *Campaigns in Europe*, Defendants have violated the copyright of the underlying Eisenhower Book and concomitantly infringed Plaintiffs' exclusive right and license to reproduce and distribute television programs in the videocassette format that are based upon or derived from the Eisenhower Book. Furthermore, by copying virtually one-hundred percent of Plaintiffs' *Crusade in Europe* video documentary series, substituting their names in the credits as creators of the videos in place of Plantiffs', and distributing Plaintiffs' video documentary series in their own packaging, Defendants have mislead the public by placing Plaintiffs' work into the marketplace as if it was their own. As described in greater detail below, Defendants' conduct constitutes (1) copyright infringement under the Copyright Act of 1976, as amended, 17 U.S.C. §§ 101 *et seq.*, (2) reverse passing off under the Trademark Act of July 5, 1946, as amended, 15 U.S.C. §§ 1051 *et seq.*, and (3) unfair competition under California Business and Professions Code §§ 17200 *et seq.* and §§ 17500 *et seq.*, and California common law.

FIRST CLAIM FOR RELIEF
(Copyright Infringement under 17 U.S.C. §§ 101 *et seq.* against all Defendants)

13. Plaintiffs reallege the allegations contained in paragraphs 1 through 12 of this First Amended Complaint as though fully and completely set forth herein.

14. Dwight D. Eisenhower was the author and creator of the Eisenhower Book, entitled *Crusade in Europe*, his memoirs of his celebrated tour of duty as a five-star

general for the United States in World War II. The Eisenhower Book tells the complete story of the war as Eisenhower planned and lived it. Through his eyes, the Eisenhower Book illuminates the enormous scope and drama of the war, including its strategy, battles, and moments of fateful decision.

15. The Eisenhower Book is wholly original with Eisenhower and contains copyrightable subject matter under the laws of the United States.

16. Doubleday; a division of Bantam Doubleday Dell Publishing Group, Inc., is the publisher of the Eisenhower Book. Doubleday is, and at all material times herein was, the sole owner and proprietor of all right, title and interest in and to the copyrights in the Eisenhower Book. Doubleday has complied in all respects with the Copyright Act of 1909, the Copyright Act of 1976 and all other laws governing copyright, and secured exclusive rights and privileges in and to the copyrights in the Eisenhower Book. Doubleday has obtained from the Register of Copyrights at the United States Copyright Office certificates of registration for the original and renewal copyrights for the Eisenhower Book. True and correct copies of the registration certificates for the Eisenhower Book's original copyright, No. A27759, and the renewal copyright, No. R619452, are attached hereto as Exhibits A and B and incorporated herein by reference. Doubleday's exclusive rights in the copyrights of the Eisenhower Book are still valid throughout the world.

17. Excerpts from the Eisenhower Book were also published daily in the *New York Herald Tribune* from November 7, 1948 through December 6, 1948. Doubleday is, and at all material times herein was, the sole owner and proprietor of all right, title and interest in and to the copyrights of the excerpts from the Eisenhower Book that appeared in the *New York Herald Tribune*. Doubleday has complied in all respects with the Copyright Act of 1909, the Copyright Act of 1976 and all other laws governing copyright, and secured exclusive rights and privileges in and to the

copyrights in the *New York Herald Tribune* excerpts. Doubleday has obtained from the Register of Copyrights at the United States Copyright Office the following certificates of registration for the original and renewal copyrights for the *New York Herald Tribune* excerpts:

Date Excerpt Appeared in the *New York Herald Tribune*	Registration Number	Renewal Number
November 7, 1948	B57652	R621230
November 8, 1948	B57653	R621231
November 9, 1948	B57654	R621232
November 10, 1948	B57655	R621233
November 11, 1948	B57635	R621229
November 12, 1948	B57634	R621228
November 13, 1948	B57718	R621236
November 14, 1948	B57719	R621237
November 15, 1948	B57720	R621238
November 16, 1948	B58058	R621251
November 17, 1948	B57721	R621239
November 18, 1948	B57722	R621240
November 19, 1948	B57814	R621243
November 20, 1948	B58059	R621252
November 21, 1948	B57812	R621241
November 22, 1948	B57813	R621242
November 23, 1948	B57716	R621234
November 24, 1948	B57717	R621235
November 25, 1948	B57815	R621244
November 26, 1948	B58426	R621257
November 27, 1948	B57880	R621245

November 28, 1948	B57881	R621246
November 29, 1948	B57882	R621247
November 30, 1948	B58060	R621253
December 1, 1948	B57894	R621248
December 2, 1948	B57945	R621250
December 3, 1948	B57944	R621249
December 4, 1948	B58061	R621254
December 5, 1948	B58062	R621255
December 6, 1948	B58063	R621256

Doubleday's exclusive rights in the copyrights to the excerpts from the Book that appeared in the *New York Herald Tribune* are still valid throughout the world.

18. By agreement dated November 20, 1948 (the "Television Agreement"), Doubleday granted to FOX the sole and exclusive television rights in and to the Eisenhower Book. A true and correct copy of the Television Agreement is attached hereto as Exhibit C and incorporated herein by reference. Pursuant to the Television Agreement, FOX produced an award-winning television series that was derivative of and bore the same title as the Eisenhower Book (hereinafter the "Programs"), namely *Crusade in Europe*. Through spectacular newsreel footage and close-up accounts, the Programs brought Eisenhower's Book to life, depicting the Allies' slow march toward victory in Europe. In bringing the definitive account of the war in the European Theater of Operations to television, the Programs incorporated numerous elements of original subject matter contained in the Eisenhower Book.

19. By agreement dated June 12, 1988 (hereinafter the "Doubleday/FOX Agreement"), Doubleday granted to FOX for a period of seven years the sole and exclusive television and ancillary rights in and to the Eisenhower Book, including,

without limitation, the right to project, exhibit, broadcast, transmit, distribute and exploit the Programs in all media, including, but not limited to video cassettes, and to license and to sublicense any parties to do the same. A true and correct copy of the Doubleday/FOX Agreement is attached hereto as Exhibit D and incorporated herein by reference. On March 11, 1993, Doubleday and FOX amended the Doubleday/FOX Agreement to extend the term of FOX's exclusive license to fourteen years. A true and correct copy of this amendment to the Doubleday/FOX Agreement is attached hereto as Exhibit E and incorporated herein by reference. Doubleday and FOX obtained a Certificate of Recordation for the amendment to the 1988 Agreement, dated February 13, 1996, a true and correct copy of which is attached hereto as Exhibit F and incorporated herein by reference.

20. By agreement dated June 22, 1988 (hereinafter the "FOX/SFM Agreement"), FOX granted to SFM for a period of 7 years the right to act as its exclusive sales agent and distributor of the Programs in all media, including, but not limited to video cassettes, and to license and to sublicense any parties to do the same. A true and correct copy of the FOX/SFM Agreement is attached hereto as Exhibit G and incorporated herein by reference. The term of the FOX/SFM Agreement automatically was extended to fourteen years upon the March 11, 1993 amendment of the Doubleday/FOX Agreement. FOX and SFM obtained a Certificate of Recordation for the FOX/SFM Agreement, dated February 13, 1996, a true and correct copy of which is attached hereto as Exhibit H and incorporated herein by reference.

21. By agreement dated July 27, 1984 (hereinafter the "SFM/NEW LINE Agreement"), which was amended on October 27, 1986, May 12, 1987, and December 15, 1991), SFM granted to Embassy Home Entertainment ("EHE"), and thus to NEW LINE as EHE's successor in interest, the exclusive right and license to manufacture and distribute videocassettes of the Programs. That license is still in effect

today. A true and correct copy of the SFM/NEW LINE Agreement and its December 15, 1991 amendment are attached hereto as Exhibits I and J and incorporated herein by reference.

22. Thus, pursuant to the Doubleday/FOX, FOX/SFM, and SFM/NEW LINE Agreements and their amendments, Plaintiffs, at all times relevant hereto, were and are the holders of the exclusive rights to reproduce, distribute, and license the reproduction and distribution of any television program in the videocassette format that is based upon, derived from or utilizes elements of original subject matter contained in the Eisenhower Book, including the Programs.

23. In approximately 1992, pursuant to the Doubleday/FOX, FOX/SFM, and SFM/NEW LINE Agreements, EHE first manufactured and distributed the Programs in a six-part series of videocassettes under the title *Crusade in Europe*. As a reproduction of the Programs in the videocassette format, *Crusade in Europe* contains elements of original subject matter from the Eisenhower Book that are protected by copyright. In fact, the packaging of each *Crusade in Europe* videocassette displays the following notice: "The Exclusive Picturization of General Dwight D. Eisenhower's book CRUSADE IN EUROPE published by Doubleday & Company Inc. © 1948 Doubleday & Company Inc." NEW LINE, as EHE's successor in interest, continues to offer *Crusade in Europe* for sale today.

24. Plaintiffs are informed and believe and thereupon allege that Defendants have — without Plaintiffs' authorization or consent — copied and reproduced videocassettes of the Programs. In so doing, Defendants have appropriated elements of original subject matter contained in the Eisenhower Book to which Plaintiffs are owners of exclusive rights under the copyrights of the Eisenhower Book and the *New York Herald Tribune* excerpts from the Eisenhower Book.

25. Defendants have, from time to time within the last three (3) years, distributed unauthorized videocassette copies of the Programs, under the title *Campaigns in Europe*.

26. As such, Defendants' *Campaigns in Europe* series unlawfully uses original subject matter contained in the Eisenhower Book and the *New York Herald Tribune* excerpts, which is still copyrighted, and whose television and video rights are vested exclusively in FOX, SFM and NEW LINE, as set forth with greater specificity above. Defendants' unauthorized distribution of *Campaigns in Europe* constitutes an invasion of Plaintiffs' exclusive right to project, exhibit, broadcast, transmit and distribute television programs in the videocassette format that are derivative of the Eisenhower Book, under the Doubleday copyrights to the Eisenhower Book and the *New York Herald Tribune* excerpts.

27. On July 15, 1997, Plaintiffs sent MARATHON MUSIC & VIDEO c/o ENTERTAINMENT DISTRIBUTING a letter notifying Defendants of their infringing acts and requesting that Defendants cease and desist from further distribution of *Campaigns in Europe*. A true and correct copy of this letter is attached hereto as Exhibit K and incorporated herein by reference. Defendants responded with a written request that Plaintiffs provide documentation evidencing their ownership and distribution rights with respect to the *Crusade in Europe* series. On December 18, 1997, Plaintiffs furnished such materials, accompanied by a cover letter sent by certified mail, return receipt requested, in which Plaintiffs again requested that Defendants cease and desist from distributing *Campaigns in Europe*. A true and correct copy of this letter is attached hereto as Exhibit L and incorporated herein by reference. Defendants have ignored this written communication and continue to offer *Campaigns in Europe* for sale in direct contravention of copyright law.

28. Each infringing duplication of the Programs, or sale or rental of *Campaigns in Europe*, as well as Defendants' threat of continuing the same, constitutes a separate claim

against Defendants under the Copyright Act. Plaintiffs have sustained, and will continue to sustain, substantial pecuniary damage to the value of their exclusive rights in and to the Eisenhower Book (and the *New York Herald Tribune* excerpts thereof) in that the previously described activities of Defendants have diminished and will continue to diminish the revenues that Plaintiffs otherwise would receive. In addition, Defendants have realized unlawful and unjust profits from their unauthorized and illegal duplication of the Programs and distribution of *Campaigns in Europe*.

29. Defendants have continued to infringe said rights, and unless permanently enjoined by Order of this Court, will continue to infringe said rights, all to Plaintiffs' irreparable injury. As a result of Defendants' acts of infringement, Plaintiffs are without an adequate remedy at law in that damages are difficult to ascertain and, unless injunctive relief is granted as prayed for herein, Plaintiffs will be required to pursue a multiplicity of actions.

30. Defendants have committed all of the aforesaid acts of infringement deliberately, knowingly, willfully, maliciously and oppressively, without regard to Plaintiffs' proprietary rights.

SECOND CLAIM FOR RELIEF
(Reverse Passing Off under 15 U.S.C. §§ 1051 *et seq.* against all Defendants)

31. Plaintiffs reallege the allegations contained in paragraphs 1 through 30 of this First Amended Complaint as though fully and completely set forth herein.

32. Defendants distribute and sell *Campaigns in Europe* in a box that bears the following label in large, bold print: "Contains Film Footage from the Previously Released CRUSADE IN EUROPE." But *Campaigns in Europe* does not merely contain film footage from *Crusade in Europe*, it is *Crusade in Europe*!

33. Defendants have pirated virtually one-hundred percent of Plaintiffs' *Crusade in Europe* video documentary series, simply splicing off the title sequence and credits that identify Plaintiffs as the producers of the Programs and inserting a new title (and a familiar sounding one at that) and their own names in the place of Plaintiffs' names. Thus, notwithstanding the laborious and time-consuming efforts of Plaintiffs to create the Programs (*e.g.*, selecting and editing the historical newsreel footage, adapting the nearly five-hundred page Eisenhower Book for television, writing the script, and choosing the music), Defendants, by a snip of the credits and change in the packaging, have passed off Plaintiffs' award-winning video documentary series as their own. What Defendants have done is no different than if Defendants had taken *Romeo and Juliet*, whited out William Shakespeare's name, and substituted their own.

34. By the aforesaid acts, Defendants have engaged in "reverse passing off," in violation of 15 U.S.C. § 1125(a).

35. As a result of the aforesaid acts, Plaintiffs have sustained, and will continue to sustain, substantial pecuniary damages. In addition, Defendants have realized unlawful and unjust profits from their passing off Plaintiffs' video documentary series as their own.

36. Defendants have continued to infringe said rights, and unless permanently enjoined by Order of this Court, will continue to infringe said rights, all to Plaintiffs' irreparable injury. As a result of Defendants' "reverse passing off," Plaintiffs are without an adequate remedy at law in that damages are difficult to ascertain and, unless injunctive relief is granted as prayed for herein, Plaintiffs will be required to pursue a multiplicity of actions.

37. Defendants have committed all of the aforesaid acts deliberately, knowingly, willfully, maliciously and oppressively, without regard to Plaintiffs' rights as creators of the *Crusade in Europe* documentary series.

THIRD CLAIM FOR RELIEF
(California Unfair Competition)

38. Plaintiffs reallege the allegations contained in paragraphs 1 through 37 of this First Amended Complaint as though fully and completely set forth herein.

39. The aforementioned activities by Defendants are in violation of Section 17200 *et seq.* and Section 17500 *et seq.* of the California Business and Professions Code and California common law. Plaintiffs have invested substantial time and money in the development of the Programs, and Defendants have appropriated Plaintiffs' property at little or no cost. Such action by Defendants has injured Plaintiffs.

40. Defendants have unfairly competed with Plaintiffs' commercial business and Defendants' activities have deceived, misled and confused the general public. Unless permanently enjoined by Order of this Court, Defendants will continue to do so, all to Plaintiffs' irreparable injury. As a result, Plaintiffs are without an adequate remedy at law in that damages are difficult to ascertain and, unless injunctive relief is granted as prayed for herein, Plaintiffs will be required to pursue a multiplicity of actions.

41. Defendants unlawfully and wrongfully have derived, and will continue to derive income, profits and ever-increasing goodwill from their activities and Plaintiffs have sustained, and will continue to sustain, substantial injury, loss and damage.

42. Defendants have committed all of the aforesaid acts deliberately, knowingly, willfully, maliciously and oppressively, without regard to Plaintiffs' rights.

WHEREFORE, Plaintiffs TWENTIETH CENTURY FOX FILM CORPORATION, SFM ENTERTAINMENT LLC, and NEW LINE HOME VIDEO, INC. pray:

1. That Defendants, their agents, servants and employees and all persons acting in concert with them be restrained and enjoined permanently from manufacturing, copying, duplicating, selling, renting, marketing, leasing, distributing, or otherwise disposing of any unauthorized videocassette copies of *Campaigns in Europe* or any other television programs that use elements of original subject matter contained in the Eisenhower Book.

2. That Defendants, their agents, servants and employees and all persons acting in concert with them be restrained and enjoined permanently from falsely passing off the Programs as their own or otherwise misappropriating Plaintiffs' property and engaging in deceptive trade practices and unfair competition.

3. That Defendants be required to deliver upon oath all negatives, positive film prints, transcriptions, recordings, video masters or videocassettes, film and video copying machines, and documents related thereto in their possession, held for delivery to them or under their control, which infringe or which may have been used to infringe Plaintiffs' exclusive rights under the copyrights to the Eisenhower Book; and that Orders for Seizure in respect of the foregoing be issued out of this Court and that at the conclusion of this action, the Court shall order all such material so held to be surrendered to Plaintiffs or to be destroyed under § 503 of the Copyright Act, whichever shall seem to this Court to be most just and proper.

4. That Defendants be required to recall from all distributors, wholesalers, jobbers, dealers retailers and all others known to them all copies of *Campaigns in Europe*.

5. That Defendants be required to account for all gains, profits and advantages derived from their acts of infringement and for their other violations of law.

6. That Defendants be required to pay over to Plaintiffs the actual damages suffered by Plaintiffs as a result of the infringement and any profits of Defendants attributable to the infringement of Plaintiffs' exclusive rights under copyright and to pay such damages to Plaintiffs as this Court shall deem to be just and proper within the provisions of the Copyright Act, or, in the alternative, at Plaintiffs' election, statutory damages as set forth in 17 U.S.C. § 504.

7. That Plaintiffs be granted an award of three times the greater of:

a. Plaintiffs' damages for the wrongful acts of Defendants in an amount the Court deems appropriate, together with appropriate interest on such damages; or

b. Defendants' profits in accordance with the accounting demanded above, pursuant to 15 U.S.C. § 1117.

8. That Plaintiffs recover their costs of suit incurred herein.

9. That Plaintiffs recover their attorneys' fees reasonably incurred in this action.

10. That Plaintiffs recover punitive and exemplary damages because of Defendants' knowing and willful violations of Plaintiffs' rights and because Defendants' wrongful actions as herein alleged were willful, in bad faith, malicious, fraudulent, and oppressive.

11. That Plaintiffs have such other and further relief as the Court deems just and appropriate under the circumstances.

Dated: March 25, 1999

SETH ARONSON
NEIL S. JAHSS

DALE M. CENDALI
O'MELVENY & MYERS LLP

By s/ Neil S. Jahss
Neil S. Jahss
Attorneys for Plaintiffs

(Exhibits omitted)

DECLARATION OF JOHN S.D. EISENHOWER IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTERDEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-7189 DT (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, and NEW LINE HOME VIDEO, INC., a New York corporation,

Plaintiffs,

v.

DASTAR CORPORATION, an Oregon corporation, ENTERTAINMENT DISTRIBUTING, an Oregon corporation, and MARATHON MUSIC & VIDEO, an Oregon corporation,

Defendants.

* * *

DECLARATION OF JOHN S.D. EISENHOWER IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTERDEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

Plaintiffs' and Counterdefendants' Cross-Motion

Date: December 6, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

Defendants' Motion

Date: November 22, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

I, JOHN S.D. EISENHOWER, declare:

1. I am the son of General Dwight D. Eisenhower, the thirty-fourth President of the United States of America. I make this Declaration in connection with the above-captioned litigation, in which the renewal copyright to my father's book, *Crusade in Europe*, has been challenged.

2. I graduated from the United States Military Academy at West Point in 1944 and received a Master's Degree in English literature from Columbia University in 1950. After my graduation from West Point, I served in Europe in the last stages of World War II. I continued to serve in the military over the next eighteen years, commanding American units occupying Austria, and serving as a front-line officer with the Third Infantry Division in the Korean War. I later worked as an assistant to General Goodpaster on my father's White House staff. At the conclusion of my father's second term as President, I took an extended leave from the Army to help my father write *The White House Years*, a two volume account of his Presidency, which was published by Doubleday. Since resigning from the Army in 1963, I have worked principally as a military historian, having written numerous books, including *The Bitter Woods: A Comprehensive Study of the Battle of the Bulge, 1944*; *Allies: Pearl Harbor to D-Day*; *So Far from God: The U.S.*

War with Mexico, 1846-48; *Intervention!: The United States and the Mexican Revolution, 1913-1917*; *D-Day 1944*; and most recently, *Agent of Destiny: The Life and Times of General Winfield Scott*. I also was the United States' Ambassador to Belgium from 1969 to 1971.

3. My father was the author of the book *Crusade in Europe* (hereinafter the "Book"), his memoirs of his tour of duty as the leader of United States and Allied Forces' troops in Europe during World War II (the "War"). When the United States entered the War in December of 1941, General George C. Marshall appointed my father to the Army's war plans division, which soon became the Operations Division of the War Department. In June 1942, he was appointed commander of United States troops in Europe, and ultimately Supreme Commander of the Allied Expeditionary Forces. By the time that the Allies crossed the Rhine and Germany surrendered in May of 1945, my father had been promoted to the five-star rank of General of the Army. After being given a hero's welcome upon returning to the United States after the War, my father left active duty in the Army, first to become President of Columbia University, Supreme Commander, Europe (NATO) and then President of the United States.

4. Given my father's role as the commander of the allied force that led to the defeat of Nazism, my father's perceptions and view of the War was of unique historic importance. Thus, even prior to his retirement from the military, my father was relentlessly courted by book publishers to write his memoirs of his War experiences. For years, my father rejected these proposals. As I wrote in my own 1974 autobiography, *Strictly Personal*, my father spurned offers to write a book about his years in the War because he thought it would only exploit the work and sacrifices made by others. (A true and correct copy of a relevant excerpt from *Strictly Personal* is attached hereto as Exhibit A.)

5. Notwithstanding my father's steadfast refusal to write his memoirs, he continued to be pursued by publishers who sought to change his mind. My father's friend, Douglas M. Black, President of Doubleday during the 1940's and a trustee of Columbia University, was the most convincing. With the assistance of colleagues at *The New York Herald Tribune*, which wanted to serialize excerpts of my father's memoirs, Mr. Black emphasized to my father the historical importance of a book that chronicled his War years in my father's own words and the large number of people that would be interested in reading what my father had to say about his experience as Supreme Commander of the Allied forces. When numerous books about the War came out that my father believed were inaccurate, Mr. Black ultimately was able to convince my father that only he could set the record straight. Thus, as I wrote in my autobiography *Strictly Personal*, Mr. Black of Doubleday was instrumental in getting my father to write *Crusade in Europe*. *See* Exh. A.

6. The contract between Doubleday and my father for the Book, with which I am familiar through conversations with my father, was highly unusual for the times, as it memorialized an outright sale of my father's entire interest in the manuscript to Doubleday. He received a substantial, one-time, fixed sum of money in lieu of ongoing royalties. Thus, the Book was commissioned at Doubleday's expense, and I — as well as the other heirs of my father's estate — have no continuing financial interest in the Book or its renewal copyright.

7. Once my father agreed to Mr. Black's request to write his memoirs for Doubleday, he immediately began working on the manuscript. Although my father had turned over most of his military responsibilities to General Bradley, he resided for a few weeks at Quarters No. 1 at Fort Myer in Virginia. He dictated his memoirs to three secretaries. Although I do not know for sure, I assume the secretaries were provided by Doubleday, at Doubleday's expense.

8. While my father wrote the Book in his own words, he was not a professional writer and thus benefited from Doubleday's editorial contributions — especially given the scope of the project and the pressure that he was under to meet a Fall of 1948 deadline. I would estimate that five percent of the Book reflects Doubleday's cosmetic editorial changes, including the addition of the framing sequence at the beginning of the Book.

9. To assist my father, Doubleday put together a team of senior editors from Doubleday and *The New York Herald Tribune*, including Ken McCormick (the former Editor-in-Chief of Doubleday), Joe Barnes, Frank Price and Kevin McCann. I myself once saw my father work with editors from Doubleday and *The New York Herald Tribune* in May of 1948.

10. Through my father's hard work and the editorial and secretarial assistance provided by Doubleday, my father was able to complete drafting the Book in only one hundred days. My father was very proud of the Book. As a military historian, I believe that the Book uniquely reflects my father's near-contemporary, first-hand account of the War without the filter of the passage of time.

11. If it were not for Mr. Black's urging, the Book might not have been written. I also know that Doubleday took a risk in paying a large, lump sum of money upfront for the rights to the Book, instead of paying my father on a royalty basis, when it was unclear how successful the Book would be. Fortunately for Doubleday, the Book became a best-seller and ultimately was made into a multi-part documentary television series by Twentieth Century Fox Film Corporation ("Fox"). I have watched Fox's documentary and think it was well done.

12. Because my father's manuscript was commissioned by and sold outright to Doubleday, I, as executor of his estate, have never believed that I or my father's other heirs have any ownership interest in the renewal copyright for the Book.

Consequently, we never sought to renew the Book's copyright because this was obviously Doubleday's prerogative, as owner of the rights to the Book, to do so.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on this 4th day of November, 1999, at Trappe, Maryland.

s/ John S.D. Eisenhower
John S.D. Eisenhower

DECLARATION OF SAMUEL S. VAUGHAN IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTERDEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-7189 DT (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, and NEW LINE HOME VIDEO, INC., a New York corporation,

Plaintiffs,

v.

DASTAR CORPORATION, an Oregon corporation, ENTERTAINMENT DISTRIBUTING, an Oregon corporation, and MARATHON MUSIC & VIDEO, an Oregon corporation,

Defendants.

* * *

DECLARATION OF SAMUEL S. VAUGHAN IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTERDEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

Plaintiffs' and Counterdefendants' Cross-Motion

Date: December 6, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

Defendants' Motion

Date: November 22, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

I, SAMUEL S. VAUGHAN, declare:

1. I am Editor-at-Large of counterdefendant Random House, Inc. Doubleday & Co., which published General Eisenhower's book *Crusade in Europe ("Crusade")* in 1948, later became part of Bantam Doubleday Dell Publishing Group, Inc., which merged with Random House, Inc. in 1998 under the latter's name. I make this declaration in opposition to defendants' motion for summary judgment and motion to dismiss, and in support of plaintiffs' and counterdefendants' cross-motion for summary adjudication of issues.

2. My entire professional career has been spent as an editor, publisher and author. I worked for Doubleday & Co., Inc. from 1952 to 1985. I was Senior Editor of its Doubleday Publishing Company from 1958 to 1968, Executive Editor from 1968 to 1970, Publisher and President from 1970 to 1982, and finally, Editor-in-Chief from 1982 to 1985. In 1986, I joined Random House, Inc., serving as Senior Vice President from 1986 to 1990, and Editor-at-Large from 1990 to the present. I have attached as Exhibit A a summary of my background, which includes the positions I have held, as well as a list of the books and other publications I have written, a partial list of the authors for whom I have been editor or publisher, and other matters.

3. I joined Doubleday in 1952, approximately four years after the publication of *Crusade*. But I have learned a great deal about the origin, writing, and publication of *Crusade* in conversations with many people with whom I have worked over my nearly fifty-year career at Doubleday and Random House, including Eisenhower himself, Douglas M. Black, who was President of Doubleday in the 1940's (and a trustee of Columbia University, where Eisenhower served as President before his election as President of the United States), and Kenneth McCormick, who was Editor-in-Chief of Doubleday from 1942 to 1971 and the chief editor for *Crusade*. Eisenhower, Black, and McCormick have all died, and to my knowledge, no one else who was directly involved with the publication of *Crusade* is still alive.

4. I worked closely with Eisenhower on several projects for Doubleday after *Crusade*, including his Presidential memoirs (*The White House Years*), when I was posted to Gettysburg for that purpose. I also worked directly for McCormick, and of course for Black, a close friend of Eisenhower's.

5. With World War II ending in the Allies' favor, Doubleday recognized the importance of, and potential market for, a book by Eisenhower, the architect of the Allied campaign. Therefore, with the approval of Black and the assistance of colleagues at *The New York Herald Tribune*, who wished to serialize Eisenhower's memoirs, McCormick vigorously urged Eisenhower to write his memoirs of his World War II experiences. Doubleday and *The Herald Tribune* went all out in their pursuit of Eisenhower, recognizing that generals — not being professional writers — usually have to be persuaded to write books. Doubleday and *The Herald Tribune* helped Eisenhower reach the decision by pointing out that other books about World War II would tell the story differently, and perhaps inaccurately, and that Eisenhower had the unique opportunity to record the true story of the conflict for history.

6. Eisenhower had *no* previous experience as a book author, his writing chiefly confined, as he put it, to "reports" that were really Government-owned works for the Army. Thus, he welcomed Doubleday's assistance and supervision in fashioning a book, not a "report."

7. Doubleday, with the help of the *Herald Tribune* at the outset of the project, mobilized an unusual effort involving substantial time, expense and high-level personnel. McCormick, Doubleday's chief editor, along with Joe Barnes, an editor from the *Herald Tribune*, made frequent trips (at least one a week) to Fort Myer in Virginia, where Eisenhower resided and worked. It was an extremely close working relationship, with Eisenhower producing the material and McCormick and Barnes providing significant comments and guidance. This procedure was very different from the typical editorial arrangement, when only one editor is involved, and then generally much later in the process. I think it fair to say, from everything I know, that *Crusade* had the benefit of an intense form of cooperation between Eisenhower and McCormick and Barnes, *Crusade*'s two chief editors.

8. While the *Herald Tribune* and Doubleday initiated the project to publish *Crusade*, Doubleday quickly assumed the principal role in its formation and execution. It was decided early that Doubleday, as the book publisher, should take the lead, with the *Herald Tribune*, as the publisher of portions of *Crusade* in serialized form, playing a subordinate role. Thus, aside from the payment made to Eisenhower, to which both Doubleday and *The Herald Tribune* contributed, Doubleday shouldered a great deal of the expense of the project, including paying for the editorial team and several secretaries assigned specifically to help Eisenhower. I have been told that Doubleday did the fact checking for *Crusade*. That would be typical for works made for hire, but highly unusual in the ordinary author-publisher arrangement. In my experience as an editor, publisher and writer, I can think of

few comparable efforts to Doubleday's in facilitating and guiding the writing and publishing of *Crusade*. While *Crusade* was clearly Eisenhower's story, it would not have been written without the publishers' urging, not to mention the considerable assistance provided and expense incurred by Doubleday.

9. *Crusade* was unusual in other respects, as well. I am not a lawyer, but the common understanding of the term "work made for hire" in the publishing business, at the time of *Crusade*'s writing and publication, was a book that the publisher owned outright, without any further obligation to the writer beyond the payment, usually a lump sum paid at the outset. The financial arrangement that evolved for *Crusade* was a one-time, fixed payment upfront, without further financial expectation in the form of continuing royalties, in return for the unconditional sale of all of his rights in the work outright to Doubleday. There were tax advantages for Eisenhower in structuring the deal for *Crusade* in this manner, in the form of capital gains treatment, something I understand that he cleared in advance with the Internal Revenue Service.

10. In my experience, I know of no example of a book bought outright that was not a work made for hire. Eisenhower was paid what was then a very substantial amount of money ($635,000) that was in effect a guarantee, with Eisenhower forgoing any further monetary or other interest in the book and Doubleday acquiring the copyright and all other rights thereto. It was an unusual arrangement at the time (and even now), especially for a so-called trade book that was intended for general readers (as opposed to textbooks, reference books and the like). More typical then (and now) was an arrangement in which the author, retaining the copyright, received a continuing royalty based on the book's sales, plus a smaller advance payment recoupable from royalties and other earnings. While the publisher does not own the copyright, that sort of royalty arrangement is far

less risky for a publisher, because payments to the author usually depend largely on the book's sales, with both author and publisher sharing the risk and rewards, depending on the success of the book. With *Crusade*, however, Doubleday not only paid Eisenhower an unusually high guaranteed sum of money, but it absorbed the entire risk in the event *Crusade* sold poorly. In return for bearing those risks, Doubleday obtained all rights in *Crusade* on a work-for-hire basis.

11. It was Eisenhower's decision to enter the arrangement for *Crusade* that paid him an upfront, lump sum in return for producing *Crusade's* manuscript on a work for hire basis (*i.e.*, giving up all interest in the copyright). An author at that time, I believe, could have retained an ongoing financial interest in the work and sought to lessen the tax impact through a "royalty spreadforward" arrangement (*i.e.*, spreading current income over a period of time in the future). But Eisenhower preferred the upfront, guaranteed payment and even more favorable capital gains treatment. For his later books with Doubleday, Eisenhower — in contrast to the arrangement for *Crusade* — followed the more traditional approach of retaining the copyright and participating in the books' earnings by an advance and an ongoing royalty interest. Therefore, *The White House Years* was not written by Eisenhower as a work for hire, but instead was registered in the name of Eisenhower himself, rather than Doubleday. Attached hereto as Exhibit B is a true and correct copy of the original registration certificate for *The White House Years*. With Eisenhower's death in 1969, his son John, as his surviving heir, renewed *The White House Years* in 1991. Attached hereto as Exhibit C is a true and correct copy of the renewal registration for *The White House Years*.

12. I was President and Publisher of the Doubleday Publishing Company in 1975 when it renewed the copyright in *Crusade*. Because *Crusade* was a work made for hire, it was Doubleday's understanding that it was the appropriate

party to renew the copyright in *Crusade*. I was, of course, not directly responsible for the filing of the renewal, which was handled by our copyright department. But publishing is founded on copyright; copyrights are the legal and financial stock-in-trade of the publishing business, and publishers — Doubleday included — take the matter of copyrights and their renewals very seriously. To my knowledge, no one — until this litigation — has *ever* challenged the validity of Doubleday's renewal copyright in *Crusade* or even suggested that it might be improper or invalid. There certainly was no issue raised at the time of the renewal by Eisenhower's estate or anyone else. It is ironic that the copyright renewal is challenged not by the author's heirs, but by someone who is a complete stranger to the author-publisher relationship and who had no involvement of any kind in the writing and publishing of *Crusade*.

13. *Crusade* has been a popular and critical success for Doubleday. In fact, to commemorate its 100th anniversary in 1997, Doubleday asked a group of writers, journalists, booksellers, educators, and others to identify the most important books that Doubleday has published over the past one-hundred years. *Crusade* was selected as one of seven books that broke new ground in nonfiction.

14. As someone who has worked in the publishing industry for nearly fifty years, I am disturbed that Dastar is attacking the copyright in one of the most important books about World War II, which was written by one of the War's most respected military figures and later, popular presidents. It is difficult from my perspective to see what justification Dastar has in seeking to invalidate the copyright in a work of such stature and importance. As I stated above, neither Eisenhower nor his heirs have ever questioned the validity of *Crusade*'s original or renewal copyrights, and in my view, there is no reason to second-guess them now.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 4th day of November, 1999, at New York, New York.

s/ Samuel S. Vaughan
Samuel S. Vaughan

EXHIBIT A

SAMUEL S. VAUGHAN _____ Editor, Publisher, Author

Home: 23 Inness Road • Tenafly, NJ 07670 •
(201) 568-9485 Phone • (201) 568-7527 Fax
Office: Random House, Inc. • 201 East 50th Street •
New York, NY 10022 • (212) 572-8730
Phone • (212) 572-4949
Fax • E-Mail: svaughan@randomhouse.com

BORN: August 3, 1928, Philadelphia, Pennsylvania

EDUCATION: *Philadelphia and Harrisburg, PA. public schools. Penn State University*
B.A. in journalism, 1951. Editor-in-Chief, photographer, jazz columnist, art director, *Froth* (humor magazine), First editor *Inkling*, literary magazine.
Distinguished Alumnus, 1977. Alumni Fellow, 1981

MILITARY:
U.S. Marine Corps, 1946-48
- *Parris Island, S.C.*
- Photographer & cameraman, motion picture unit, Camp Pendleton, CA. (movies, newsreels, etc. in California, Hawaii, North China and Guam.)

WORK EXPERIENCE:
King Features Syndicate
- Deskman (minor writing and editing), 1951.

Doubleday & Co., Inc.

- Assistant Manager, Doubleday Syndicate (sales & editing, rights department), 1952-54.
- Doubleday Publishing Co.
- Advertising Manager, 1954-56.
- Sales Manager, 1956-58.
- Senior Editor, 1958-68.
- Executive Editor, 1968-70.
- Publisher and President, 1970-1982.
- Editor-in-Chief, 1982-85.
- Vice President, Doubleday & Co., Inc. (parent company), 1970-85.

Random House, Inc.

- Senior Vice President, Random House, 1986-90.
- Editor-at-Large, Random House, Inc., 1990-present.

ASSOCIATIONS:

Association of American Publishers

- Chairman, General Books Council, 1972-74.
- Founding Chairman, Education for Publishing Committee, 1975-78.

AWARDS AND HONORS: — Publishers Ad Club, Ad of the Year, 1956 for Richard Llewellyn's *novel, Mr. Harnish Gleave.* — *Bowker Memorial Lecturer, 1976*

ADVISORY BOARDS:

Foreign Policy Association; New York University Dystel Fellowships; City University of New York Graduate Center, Education for Publishing Program; Crouse Publishing Arts Library; Harvard University Press, Visiting Committee; RIF (Reading is Fundamental, Washington, D.C.); Tony Godwin Editing Award, Judge, 1994; Foxfire Board; New York Public Library, Friends Committee.

PUBLICATIONS:

Books for Children:

- *Whoever Heard of Kangaroo Eggs?* New York: Doubleday, 1957 & London: World's Work.
- *New Shoes.* New York: Doubleday, 1961 & London: World's Work.
- *The Two-Thirty Bird.* New York: Norton, 1965, Reprinted by Grossett & Dunlap, Science Service, and Young Reader's Press.

OTHER BOOKS:

- *Little Red Hood* (humor, pseudonymous with illustrator Tony Ross.) New York: Doubleday, 1979
- *The Little Church.* Privately published history, 1969.
- *The Accidental Profession.* AAP, 1979. (principal author).
- *Medium Rare: A Look at the Book and Its People.* Bowker, 1977.

OTHERS:

- Articles in *The New York Times, The Sunday Times (London)*, etc.
- *Editors on Editing* (chapter, "Letter from the Editor"). Harper, 1985.
- "The State of the Heart." *The Business of Publishing* (Introduction) Westview Press, 1985.
- "The Community of the Book." *Daedalus*, 1983. Reprinted in *Reading in the 80's.* Bowker, 1983 and in *Library Lit: The Best of 1984.* Scarecrow Press. 1984.
- "The Question of Biography" (with Daniel Boorstin, Edmund Morris, James Thomas Flexner, David McCullough) *Biography and Books.* Library of Congress, 1985.
- "The Magic is in the Mysteries." *My First Year in Book Publishing.* (Introduction) New York: Walker, 1994

FACULTY MEMBER: The New School, 1976; Columbia University, 1978-1988.

LECTURES:
Radcliffe, University of Denver, NYU, Stanford, Library of Congress, Penn State, etc

PERSONAL:
Married: Jo Vaughan. Children: Jeffrey Marc, Leslie Jane, Dana Alexander, David Samuel.

MEMBER:
The Century Association (NY); Tenafly Tennis Club (NJ); Quantuck Beach Club (Quogue, NY). (Ex-member: The Lambs; The Dutch Treat Club; The Coffee House.)

EDITOR/PUBLISHER FOR (PARTIAL LIST):

Diane Ackerman, Shana Alexander, Stephen Ambrose, Patrick Anderson, Bernard Asbell, Isaac Asimov, Laurence Barrett, Dave Barry, Brendan Behan, Ezra Taft Benson, Bill Bradley, Brassai, William F. Buckley, Jr., Herb Caen, Hortense Calisher, Bruce Catton, Charlotte Chandler/Fellini, Joanne Ciulla, George Cuomo, Max Eastman, Dwight D. and, Milton, and John S.D. Eisenhower, Duke Ellington, Paul Erdman, Fannie Flagg, Sarah Gainham, Ernest K. Gann, Larry Gelbart, Winston Graham, George Garrett, Ruth Gordon, William Goyen, Hannah Green, Josh Greenfield, Leonard Gross, Arthur Hailey, Alex Haley, Marilyn Harris, William Harrison, W.C. Heinz, Mohamed Heikal, Patty Hearst, Thor Heyerdahl, Sir Edmund Hillary, Rolaine Hochstein, Hubert H. Humphrey, J.R. Humphreys, Hammond Innes, Roger Kahn, Garson Kanin, Dr. Fred Kantrowitz, Richard Ketchum, Marvin Kitman, Stephen King, F. Sionil José, Eric Larrabee, Gordon Lish, Alistair MacLean, D. Keith Mano, Kai Maristed, John Bartlow Martin, Martin Mayer, Eugene McCarthy, James Michener, James Mills, Gilbert Millstein, Alvin Moscow, Edmund Muskie, Paul Nagel, N. Richard Nash, David Niven, Louis Nizer, William Abrahams & the *O. Henry Prize Stories*, Jake Page, William Paley, Joe Paterno, Stanley Pottinger, Jean-Francois Revel, Nelson

Rockefeller, William Safire, Pierre Salinger, Harrison Salisbury, Jonathan Schwartz, Winfield Townley Scott, W.B. Seitz, Israel Shenker, Bud Shrake, Nancy Sinatra, David Slavitt, Wilbur Smith, Elizabeth Spencer, Wallace Stegner, Alma Stone, Irving Stone, Lewis L. Strauss, Gay Talese, Alexander Theroux, Tommy Thompson, Ann Thwaite, Henri Troyat, Margaret Truman, Leon Uris, Immanuel Velikovsky, Earl Warren, Peter Watson, Tom Wicker, Paul Wilkes, Lauren Wolk, Yevtushenko.

(Exhibits B and C omitted)

DECLARATION OF STANLEY MOGER IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTER-DEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-7189 DT (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, and NEW LINE HOME VIDEO, INC., a New York corporation,

Plaintiffs,

v.

DASTAR CORPORATION, an Oregon corporation, ENTERTAINMENT DISTRIBUTING, an Oregon corporation, and MARATHON MUSIC & VIDEO, an Oregon corporation,

Defendants.

* * *

DECLARATION OF STANLEY MOGER IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTER-DEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

Plaintiffs' and Counterdefendants' Cross-Motion

Date: December 6, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

Defendants' Motion

Date: November 22, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

I, STANLEY MOGER, declare:

1. In 1969, two partners and I founded SFM Media Service Corporation, renamed SFM Media Corporation several years later, as a media buying service headquartered in New York City. I spearheaded the formation of the SFM Entertainment Division several years later and headed up that business for over twenty five years. When SFM Media Corp. was sold to third parties in January 1998, I acquired the assets of the SFM Entertainment Division, which became SFM Entertainment LLC (together with its predecessor, "SFM"), a plaintiff and counterdefendant in this lawsuit. I am currently SFM's sole owner and President. I make this declaration in opposition to defendants' motion for summary judgment and motion to dismiss, and in support of plaintiffs' and counterdefendants' cross-motion for summary adjudication of issues.

2. SFM is, and has been since its formation, primarily a marketing company involved in packaging and distributing television programming. Among SFM's notable achievements over the years are the creation of the *SFM Holiday Network*, which specialized in presenting classic family movies for television; the revival of *Walt Disney's*

Mickey Mouse Club; and the development of the *Mobil Showcase Network*. SFM is presently responsible for marketing and distributing programs such as *The Flip Wilson Show*, *The Joey Bishop Show*, and many of the American Film Institute's ("AFI") programs, including *AFI's 100 Years . . . 100 Movies* and *AFI's 100 Years . . . 100 Stars*.

3. SFM has carved out a niche in reviving old programs for the purpose of presenting them to the television audiences of today. One such property that SFM restored is *Crusade in Europe*, the classic television series of 26 half-hour episodes that was created in the late 1940's and based on *Crusade in Europe*, the book by General Dwight D. Eisenhower (the "*Crusade in Europe* Series"). SFM's involvement with the *Crusade in Europe* Series began around the late Summer or early Fall of 1978, when I learned that Time, Inc. ("Time") was not attending fully to its *March of Time* library to save storage costs, a situation that if it had persisted would have led to the eventual loss of the library. The *March of Time* was a thoughtful editorial and investigative news feature series that was produced by Time from 1935 to 1951. It was principally shown in movie theatres during that period as a news feature short subject prior to the main attractions. The *March of Time* has been described as the *60 Minutes* of its day, as it delivered groundbreaking news about the events leading up to World War II, the War itself, and other subjects of that period.

4. Recognizing the historic importance and value of the *March of Time* library and the concomitant loss were it allowed to deteriorate, I spoke with representatives of Time regarding the potential of SFM preserving and distributing the library. In the course of those discussions, questions arose as to the specific films that comprised the *March of Time* library, the precise condition of the films, and the intellectual property rights in the films. On July 10, 1980, after extended discussions, SFM and Time-Life Television, a division of Time-Life Films Inc., entered into a distribution and

marketing agreement, later modified, regarding the *March of Time* library (the "SFM/Time Agreement"). A copy of the SFM/Time Agreement is attached hereto as Exhibit A.

5. Upon entering into the SFM/Time Agreement, SFM hired Morrie Roizman, a former associate producer and editor of the *March of Time*. I directed Roizman to review the collection of films and other materials that SFM had obtained from Time as part of the deal for the purpose of (1) assessing the condition of the films (because they were all old and some were damaged) and (2) reconstructing the properties (because the films, negatives, and other essential elements of the original material were missing, creating unacceptable gaps in a series or even in an individual episode). Under my supervision, SFM embarked on a major operation to restore the films so they could be repackaged and remarketed to modern television audiences. SFM invested approximately five years and over $250,000 to recover and reassemble the original *March of Time* episodes.

6. While Roizman was pursuing his part of this project, he informed me that in the late 1940's the *March of Time* had produced two multi-part television documentaries, one entitled *Crusade in Europe* and the other *Crusade in the Pacific*. He told me that the *March of Time* had produced the former for Twentieth Century Fox Television Productions, Inc. (the "Fox Division") as a work-for-hire based on the *Crusade in Europe* book (the "Book") written by General Dwight D. Eisenhower and that Fox had the rights to the *Crusade in Europe* Series. In late 1981 or early 1982, Roizman further informed me that his physical inventory of the contents of the materials provided by Time showed that the film negatives for the *Crusade in Europe* Series were missing.

7. When I learned that the film negatives for the *Crusade in Europe* Series were missing, I instructed Morrie Roizman to find a copy of the Series on film prints. When he could

not find a copy of the film in the obvious storage locations, SFM widened the search. I enlisted the assistance of persons outside SFM whom I believed had knowledge or contacts that might lead to the discovery of the film.

8. While SFM was heading up the search for a copy of the *Crusade in Europe* Series and supervising the restoration of the *March of Time* library, SFM and Embassy Home Entertainment ("EHE"), a predecessor of New Line Home Video, Inc. ("New Line"), entered into an agreement, dated July 27, 1984, in which EHE obtained the exclusive rights to distribute videocassettes of the *March of Time* newsreels and *Crusade in the Pacific* throughout the world (the "SFM/New Line Agreement"). A copy of the SFM/New Line Agreement is attached hereto as Exhibit B. This agreement provides, among other things, that in the event SFM offers worldwide home video distribution rights in the *Crusade in Europe* Series, EHE has the exclusive option of acquiring rights in that property too. Exh. B at par. 1(d).

9. Ultimately, the comprehensive and time-consuming search for the *Crusade in Europe* Series that SFM had set in motion was successful. First, around 1987 or 1988, 16mm negatives of the *Crusade in Europe* Series were located at an off-site storage facility used by Fox. Second, about six months later, I was informed about a person who had represented that he had the 35mm negatives of the *Crusade in Europe* Series stored in a vault in the Chelsea section of New York City. After an SFM employee reviewed a reel of the 35mm film elements taken from the vault and determined that it was an authentic 35mm version of the *Crusade in Europe* Series, SFM acquired this physical material for $7,500.

10. With the help of others at SFM, I fully reviewed and studied both the 16mm and 35mm copies that SFM had obtained, and evaluated their condition. SFM developed and implemented a plan to restore the *Crusade in Europe* Series.

Because the negatives were old and in rough condition, SFM sent them to a special laboratory to be restored. The negatives were also missing some titles and credits, so a new set of master tapes was prepared in 1989 incorporating a list of the original titles and credits that Time had provided in written form. SFM wanted to give credit where credit was due, and had no desire to pass off the *Crusade in Europe* Series as its original creation. SFM incurred significant expense in preparing the new titles and credits to match the classic appearance of the rest of the Series. Resurrecting the *Crusade in Europe* Series also involved, among other things, fixing the soundtrack and standardizing the opening sequences of the individual 26 episodes. The total cost of restoring the *Crusade in Europe* Series was approximately $75,000.

11. SFM entered an agreement with the Fox Division, dated June 22, 1988, in which the Fox Division appointed SFM the exclusive distributor of the *Crusade in Europe* Series in all media throughout the world (the "Fox/SFM Agreement"). The terms of that agreement run concurrently with Fox's rights to exploit the *Crusade in Europe* Series pursuant to license with Doubleday. A copy of the Fox/SFM Agreement, under cover of a certificate of recordation filed with the U.S. Copyright Office with respect to the latter agreement, is attached hereto as Exhibit C. Because Fox renewed its license in the Book with Doubleday, the term of the Fox/SFM Agreement was automatically extended, and the agreement remains in effect today.

12. Subsequently, by a December 15, 1991 amendment to the SFM/New Line Agreement, SFM contracted with New Line, now successor to EHE, in which, among other things, New Line exercised the option to distribute the *Crusade in Europe* Series as videocassettes. A copy of the December 15, 1991 amendment to the SFM/New Line Agreement is attached hereto as Exhibit D.

13. In conjunction with New Line, SFM had the *Crusade in Europe* Series repackaged for sale as videocassettes (the "*Crusade in Europe* Videos"). The Videos are a direct reproduction of the *Crusade in Europe* Series.

14. New Line commenced selling the *Crusade in Europe* Videos in retail outlets in the United States in 1993. The credits for the Videos give clear credit to the parties who created and restored the Videos and whose contributions have brought the Videos to modern audiences. For instance, credit is given to "SFM" and "New Line Home Video," and the credits also state: "A March of Time Production By Arrangement with 20th Century Fox" and "Eisenhower's Crusade in Europe Based on the Book by General Dwight D. Eisenhower."

15. Several years after the *Crusade in Europe* Series came on the market, I was reviewing various videotapes being offered at a retail store near my home in a suburb of New York City and saw a boxed set of seven cassettes entitled *Campaigns in Europe* that was being released by a company I did not recognize. On the outside of the package was displayed an oval sticker with a statement to the effect: "Contains Footage Previously Released under the title CRUSADE IN EUROPE."

16. Suspecting that there had been wrongdoing given the similar titles and the odd reference to *Crusade in Europe*, I bought a set of *Campaigns in Europe* and watched some of the tapes at home that evening. I was outraged to discover that *Campaigns in Europe* is an almost complete copy of the *Crusade in Europe* Videos that SFM had expended significant time and expense to create through a revival of the original television tapes for the *Crusade in Europe* Series. The *Campaigns in Europe* Videos copied the original 26-episode *Crusade in Europe* that was produced by Time for Fox, with minor additions and deletions (such as redone titles). The body of the *Crusade in Europe* Series was taken without authorization to create the *Campaigns in Europe* Videos.

17. I was further outraged to see that the original credits and copyright notice contained in the *Crusade in Europe* Videos and stated on the packaging for such Videos had been deleted in *Campaigns in Europe* and replaced with false credits that stated "DASTAR CORP. presents Campaigns in Europe." Because the *Crusade in Europe* Videos give credits to the same parties as the *Crusade in Europe* Series, the parties that were given credits in the *Crusade in Europe* Series were also excluded from the credits in *Campaigns in Europe*.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on this 7th day of November, 1999, at Purchase, New York.

s/ Stanley Moger
Stanley Moger

(Exhibits omitted)

DECLARATION OF STACIE V. STRAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTER-DEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-7189 DT (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, and NEW LINE HOME VIDEO, INC., a New York corporation,

Plaintiffs,

v.

DASTAR CORPORATION, an Oregon corporation, ENTERTAINMENT DISTRIBUTING, an Oregon corporation, and MARATHON MUSIC & VIDEO, an Oregon corporation,

Defendants.

* * *

DECLARATION OF STACIE V. STRAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTER-DEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

[FILED UNDER SEAL]

Plaintiffs' and Counterdefendants' Cross-Motion

Date: December 6, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

Defendants' Motion

Date: November 22, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

I, STACIE V. STRAW, declare:

1. I am a paralegal at O'Melveny & Myers LLP, counsel of record for plaintiffs Twentieth Century Fox Film Corporation, SFM Entertainment LLC and New Line Home Video, Inc. (collectively, "plaintiffs") in the above-entitled case. I make this declaration in opposition to defendants' motion for summary judgment and motion to dismiss, and in support of plaintiffs' and counterdefendants' cross-motion for summary adjudication of issues. All of the matters set forth herein are based on my personal knowledge and, if called as a witness, I could and would testify competently thereto.

2. Attached hereto as Exhibit A is a true and correct copy of an excerpt from the transcript of the deposition of Norman Andersen.

3. Attached hereto as Exhibit B is a true and correct copy of Exhibit 26 to the deposition of Norman Andersen.

4. Attached hereto as Exhibit C are true and correct copies of relevant excerpts from the deposition of Stephen Hebert.

5. Attached hereto as Exhibit D is a true and correct copy of Exhibit 61 to the deposition of Stephen Hebert.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 7th day of November, 1999, at Los Angeles, California.

s/ Stacie V. Straw
Stacie V. Straw

DEPOSITION OF NORMAN ANDERSEN
JULY 27, 1999

(Commencing at page 352)

MS. CENDALI: I would like to mark as Plaintiffs' Exhibit 26 a two-page document bearing Bates Nos. 1106 and 1107, dated 1/27/97, and ask the witness it he can identify it.

(Deposition Exhibit No. 26 marked for identification.)

A. Yes, I can.

BY MS. CENDALI:

Q. What is it?

A. A purchase order for stickers dated 1/27/97, from EBI to Rose City Label for 5,000 Crusade in Europe stickers and 5,000 Crusade in the Pacific stickers.

Q. And is the attachment to page 1106, which I see now does not seem to have a Bates No. 1107 — maybe it came off — Does that indicate what you wanted the stickers to say?

A. Yes, it does.

Q. And that the legend "Contains film footage from the previously released Crusade in Europe"?

A. That is correct.

MR. HYMAN: Objection. I would object to that because the document says — to

EDI

ENTERTAINMENT DISTRIBUTING
P. O. Box 22738/ Eugene, OR 97402
Phone 541484-7070
FAX 541/484-7188

PURCHASE ORDER

DATE 1/27/97
P.O. NO. --------3876
PAGE 1 of 1

EXHIBIT NO. 26
C & C REPORTING

TO: Rose City Label

SHIP TO: EDI,
2480 West 7th Place
Eugene, OR 97402

F.O.B.	SHIP VIA	TERMS	ORDERED BY
Eugene	Your Carrier	30 Days	WC

LINE NO.	YOUR ITEM NO. / OUR ITEM NO.	DESCRIPTION	QUANTITY / UNIT PRICE	UNIT	EXTENDED PRICE / REQUIRED DATE
		Oval Stickers as per Enclosed masters			
1		"Crusade In Europe"	5000 /		
2		"Crusade In The Pacific"	5000 /		
		Art Masters Enclosed			
		Size to be the same as 289R die -- page enclosed			
		White Gloss with Black Print			
			TOTAL		

NOTES:

Norm Andersen
authorized signature

001106

BEST AVAILABLE COPY

Contains Film Footage from the Previously Released

CRUSADE IN EUROPE

Contains Film Footage from the Previously Released

CRUSADE IN EUROPE

DEPOSITION OF STEPHEN HEBERT
JULY 29, 1999

(Commencing at page 77)

revenues attributable to Campaigns in Europe?

A. Yes.

Q. And am I correct, Mr. Hebert, that you yourself caused to be generated each of these documents that we've just discussed: Exhibits 10, 11, 59, and 60?

A. All four exhibits were generated by myself. And the computer, of course. But . . .

Q. I'd like to show you what we'll mark as Exhibit 61.

(Deposition Exhibit No. 61 marked for identification.)

MR. HYMAN: What is this, the shipments? Oh, okay.

MS. CENDALI: And, Counsel, I would like to just clarify that as best I can tell, the exhibit that we had — the one-page exhibit that we had — well —

MR. HYMAN: The one-page exhibit I gave you earlier has the monthly totals we redid as the first page of 61 in bigger type.

MS. CENDALI: Fair enough.

BY MS. CENDALI:

Q. So turning, then, to the preferred, bigger-type version of what I believe you had [78] given me yesterday as Exhibit 501, which we —

MR. HYMAN: We can take off the record.

BY MS. CENDALI:

Q. — we don't need because it's duplicative. Let's just focus on Exhibit 61. Can you identify Exhibit 61, please, Mr. Hebert?

A. Exhibit 61 is an eight-page document. Each page represents monthly net shipments of particular seven-video box set items from 10 of '95 through June of '99.

Q. And does the first page of Exhibit 61 deal with Campaigns in Europe —

A. That —

Q. Is that correct?

A. That is correct.

Q. And do subsequent pages of Exhibit 61 deal with other titles?

A. That is correct.

Q. Leaving aside the other titles for the time being, did you compile and create Exhibit 61?

A. I did.

Q. And if my question wasn't clear: Did you create all of Exhibit 61, all the pieces [79] of paper?

A. That is correct.

Q. Okay. I note that, turning to the first page, the net shipments over time of Campaigns in Europe per month, there appear to be some months when sales are substantially higher than other months.

Is that in part, in your view, attributable to the cyclical, seasonal nature of the video business, Dastar's video business?

A. All retail business, but in particular video business at Dastar.

Q. What time lag, if any, is there from — Let me start again.

In calculating what the net shipments were in a given month, how did you go about doing that?

A. The computer can generate documents like Exhibit 60, 10, 59, and 11, but we did not have sufficient time —

MR. HYMAN: Why don't you — you can tell how long it took, whatever. Why don't you say how you did this one, and then you can get into why —

A. How I did this was I created on a [80] computer screen the information that is shown on the last page of these four exhibits.

MR. HYMAN: Which ones are you talking about?

THE WITNESS: Exhibit 60, Exhibit 10, Exhibit 11, and Exhibit 59.

I called up the last page from a computer disk, took that information in a handwritten form from the computer screen, and created the individual monthly net shipments that are demonstrated by the first page of Exhibit 61.

- BY MS. CENDALI:

Q. And —

A. It would have taken more than 36 hours to print the documentation that you have in Exhibits 10, 11, and 59 on a monthly basis.

Q. Okay. Now, on — Do the figures reflect actual units shipped in the month indicated by Dastar?

A. That is correct.

Q. Typically — Sir? You wanted to add something?

A. And net returns. It's net shipments in this presentation rather than outbound, [81] returns, and a net number.

Q. Okay. So in essence, Exhibit 61 collapses the returns and sales information from Exhibits 59, 60, 10, and 11 into a single document, in terms of units at least?

A. In terms of units shipped, that's correct, yes.

Q. Okay. What time lag, if any, does Dastar have for when an order is received and units are shipped?

MR. HYMAN: And it may be indefinite as to time. If it's changed between 1995 to the present, you might want to elaborate on that.

A. From the beginning of the audio business with the major accounts, Costco and Sam's Club, which we referred to earlier, it has been our operating practice to ship within 48 hours of an order.

There will be times when we're faster than that. There will be times when we're slower than that.

With respect to Campaigns in Europe, I do not recall that we ever had a delay because we were out of product, which can happen. So I

EXHIBIT 61

NET SHIPMENTS: CAMPAIGNS IN EUROPE

30173/ Z30173

10/95:	3	07/97:	211
11/95:	3	08/97:	162
12/95:	1	09/97:	891
01/96:	5	10/97:	1746
02/96:	111	11/97:	2256
03/96:	259	12/97:	2140
04/96:	97	01/98:	145
05/96:	140	02/98:	24
06/96:	282	03/98:	672
07/96:	156	04/98:	2640
08/96:	567	05/98:	1433
09/96:	1	06/98:	378
10/96:	2422	07/98:	260
11/96:	2142	08/98:	(1138)
12/96:	2149	09/98:	225
01/97:	1227	10/98:	1544
02/97:	1140	11/98:	1249
03/97:	2948	12/98:	1126
04197:	739	01/99:	344
05/97:	1507	02/99:	201
06/97:	1156	03/99:	414
		04/99:	380
		05/99:	(587)
		06/99:	3
	TOTAL		33,774

NET SHIPMENTS: CAMPAIGNS IN THE PACIFIC

	30253/		Z30253
10/95:	—	07/97:	129
11/95:	—	08/97:	213
12/95:	—	09/97:	1105
01/96:	—	10/97:	2022
02/96:	125	11/97:	1903
03/96:	256	12/97:	2402
04/96:	183	01/98:	264
05/96:	139	02/98:	10
06/96:	286	03/98:	619
07/96:	267	04/98:	711
08/96:	785	05/98:	51
09/96:	98	06/98:	189
10/96:	1486	07/98:	300
11/96:	2007	08/98:	5
12/96:	2908	09/98:	278
01/97:	1566	10/98:	640
02/97:	813	11/98:	975
03/97:	2809	12/98:	634
04/97:	417	01/99:	538
05/97:	1389	02/99:	366
06/97:	883	03/99:	100
		04/99:	181
		05/99:	(228)
		06/99:	124
TOTAL			29,948

NET SHIPMENTS: GREAT BATTLES OF WWII

	32583/		Z32583
10/95:	—	07/97:	152
11/95:	—	08/97:	178
12/95:	—	09/97:	316
01/96:	—	10/97:	213
02/96:	—	11/97:	1511
03/96:	—	12/97:	1127
04/96:	—	01/98:	117
05/96:	—	02/98:	(19)
06/96:	—	03/98:	143
07/96:	—	04/98:	251
08/96:	—	05/98:	(60)
09/96:	—	06/98:	42
10/96:	—	07/98:	22
11/96:	—	08/98:	24
12/96:	—	09/98:	1375
01/97:	—	10/98:	1600
02/97:	1	11/98:	581
03/97:	4763	12/98:	229
04/97:	179	01/99:	62
05/97:	707	02/99:	190
06/97:	198	03/99:	110
		04/99:	5
		05/99:	(271)
		06/99:	18
TOTAL			13,764

NET SHIPMENTS: WHY WE FIGHT

	34363/	Z34363
10/95:	—	
11/95:	—	
12/95:	—	
01/96:	—	
02/96:	—	
03/96:	—	
04/96:	—	
05/96:	—	
06/96:	—	
07/96:	—	
08/96:	—	
09/96:	—	
10/96	—	
11/96:	—	
12/96:	—	
01/97:	—	
02/97:	—	
03/97:	—	
04/97:	—	
05/97:	—	
06/97:	—	
07/97:	—	
08/97:	—	
09/97:	—	
10/97:	—	
11/97:	—	
12/97:	—	
01/98:		3853
02/98:		205
03/98:		(4)
04/98:		(18)
05/98:		(156)
06/98:		(755)
07/98:		(555)
08/98:		(318)
09/98:		415
10/98:		2084
11/98:		192
12/98:		(6)
01/99:		(361)
02/99:		(104)
03/99:		(45)
04/99:		1
05/99:		(274)
06/99:		(6)
TOTAL		4,148

NET SHIPMENTS: DOCUMENTARIES OF WWII

	35793/	Z35793
10/95:	—	
11/95:	—	
12/95:	—	
01/96:	—	
02/96:	—	
03/96:	—	
04/96:	—	
05/96:	—	
06/96:	—	
07/96:	—	
08/96:	—	
09/96:	—	
10/96:	—	
11/96:	—	
12/96:	—	
01/97:	—	
02/97:	—	
03/97:	—	
04/97:	—	
05/97:	—	
06/97:	—	
07/97:	—	
08/97:	—	
09/97:	—	
10/97:	—	
11/97:	—	
12/97:	—	
01/98:	—	
02/98:	—	
03/98:	—	
04/98:	—	
05/98:	—	
06/98:	—	
07/98:	—	
08/98:		5
09/98:		2825
10/98:		3369
11/98:		1038
12/98:		479
01/99:		(201)
02/99:		(286)
03/99:		301
04/99:		883
05/99:		(609)
06/99:		(45)
TOTAL		7,759

NET SHIPMENTS: WARBIRDS

	31843/		Z31843
10/95:	—	07/97:	791
11/95:	—	08/97:	1397
12/95:	—	09/97:	1978
01/96:	—	10/97:	4781
02/96:	—	11/97:	3741
03/96:	—	12/97:	2373
04/96:	—	01/98:	2735
05/96:	—	02/98:	(39)
06/96:	—	03/98:	630
07/96:	—	04/98:	3899
08/96:	—	05/98:	2233
09/96:	—	06/98:	368
10/96:	1488	07/98:	839
11/96:	2836	08/96:	(1093)
12/96:	2282	09/98:	1751
01/97:	2125	10/98:	6248
02/97:	1491	11/98:	2331
03/97:	7722	12/98:	2849
04/97:	981	01/99:	161
05/97:	2343	02/99:	491
06/97:	1459	03/99:	717
		04/99:	2626
		05/99:	(528)
		06/99:	(99)
TOTAL			63,907

NET SHIPMENTS: TIGERS OF THE SEA

	34443/		Z34443
10/95:	—	07/97:	—
11/95:	—	08/97:	—
12/95:	—	09/97:	—
01/96:	—	10/97:	—
02/96:	—	11/97:	—
03/96:	—	12/97:	—
04/96:	—	01/98:	—
05/96:	—	02/98:	—
06/96:	—	03/98:	—
07/96:	—	04/98:	2323
08/96:	—	05/98:	1435
09/96:	—	06/98:	377
10/96:	—	07/98:	238
11/96:	—	08/98:	(489)
12/96:	—	09/98:	3407
01/97:	—	10/98:	4953
02/97:	—	11/98:	935
03/97:	—	12/98:	986
04/97:	—	01/99:	105
05/97:	—	02/99:	(110)
06/97:	—	03/99:	408
		04/99:	2743
		05/99:	(380)
		06/99:	(83)
TOTAL			16,848

NET SHIPMENTS: WARBIRDS — VOL.2

	35553/		Z35553
10/95:	—	07/97:	—
11/95:	—	08/97:	—
12195:	—	09/97:	—
01/96:	—	10/97:	—
02/96:	—	11/97:	—
03/96:	—	12/97:	—
04/96:	—	01/98:	—
05/96:	—	02/98:	—
06/96:	—	03/98:	—
07/96:	—	04/98:	—
08/96:	—	05/98:	—
09/96:	—	06/98:	369
10/96:	—	07/98:	236
11/96:	—	08/98:	209
12/96:	—	09/98:	3592
01/97:	—	10/98:	185
02/97:	—	11/98:	762
03/97:	—	12/98:	992
04/97:	—	01/99:	183
05/97:	—	02/99:	(10)
06/97:	—	03/99:	365
		04/99:	173
		05/99:	(58)
		06/99:	(192)
TOTAL			6,806

EXCERPTS FROM MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTER-DEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-7189 DT (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, and NEW LINE HOME VIDEO, INC., a New York corporation,

Plaintiffs,

v.

DASTAR CORPORATION, an Oregon corporation, ENTERTAINMENT DISTRIBUTING, an Oregon corporation, and MARATHON MUSIC & VIDEO, an Oregon corporation,

Defendants.

* * *

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTER-DEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

Plaintiffs' and Counterdefendants' Cross-Motion

Date: December 6, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

Defendants' Motion

Date: November 22, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

* * *

VI. PLAINTIFFS ARE ENTITLED TO SUMMARY ADJDUDICATION ON THEIR REVERSE PASSING OFF CLAIM UNDER THE LANHAM ACT

Defendants admit that (1) they copied the *Crusade* Series Videos, put on their own credits, and sold the "new" tapes under the substantially similar title *Campaign in Europe* (*see* Sec. II.f., *supra*.) and that the (2) *Campaigns'* credits fail to mention *any* of the plaintiffs or their role in creating or subsequently restoring the *Crusade* Videos, but instead give credit to defendants that they never earned. (*Id.*)[16] Defendants' flagrant and egregious conduct is referred to as "reverse passing off" and is condemned by the Lanham Act.

Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), provides in pertinent part as follows:

> "(1) *Any person* who, on or in connection with any goods or services . . . uses in commerce any

16. The false and self-aggrandizing nature of defendants' conduct is all the more inappropriate when contrasted with SFM's efforts and actions. When SFM discovered old negatives of the *Crusade* Series and repackaged them for sale, SFM researched and inserted the appropriate credits. (Moger Decl. ¶10.)

> word, term, name, symbol, or device, or any combination thereof, or *any false designation of origin*, false or misleading description of fact, or false or misleading representation of fact, which —
>
> > (A) is likely to cause confusion, or to cause mistake, or to deceive . . . as to the origin . . . of [such person's] goods, services, or commercial activities by another person . . .
>
> shall be liable in a civil action *by any person* who believes that he or she is or is likely to be damaged by such act." (Emphasis added.)

While a violation of Section 43(a) of the Lanham Act is frequently premised on "palming off" or "passing off" — the selling of a good or service of one's own creation under the name or mark of another, it is well recognized that this provision has broader application and encompasses economic practices that are "economically equivalent" to palming off. *Smith v. Montoro*, 648 F.2d 602, 605 (9th Cir. 1981). In *Smith*, the seminal Ninth Circuit decision in this area, the Court held that such practices include "reverse passing off," a form of false advertising described as conduct in which one takes "another party's product and sells that product under a name chosen by the wrongdoer," rather than under the name of those persons or entities that earned the designation. *Id.* Reverse palming off is condemned because it misappropriates another's work and deprives the originator of the misidentified product from receiving the goodwill associated with it. *Id.* at 607.

To establish a Section 43(a) claim for reverse passing off, the Ninth Circuit applies the "bodily appropriation" test to determine whether a sufficient amount of another's work was copied or used without giving proper credit. "Bodily

appropriation" is defined as the "copying or unauthorized use of substantially the entire item." *Cleary v. News Corp.*, 30 F.3d 1255, 1261, 1262 n. 4 (9th Cir. 1994). Defendants' wholesale copying of the *Crusade* Series in making *Campaigns* easily meets the "bodily appropriation" test. Defendants admit they copied the *entire* original footage, narration and music, and made only minor modifications (such as redoing the opening titles). (Tarter 44:11-46:14, 49:8-11, 52:15-56:22, 66:6-67:17, 76:21-82:10; Andersen 132:3-10, 195:19-24, 298:21-299:7.) Such insubstantial changes are insufficient as a matter of law to avoid liability. *Cleary*, 30 F.3d at 1261-62 ("slightly modified" product still basis for Section 43(a) claim).

Defendants incorrectly assert that because Time is listed as author of the *Crusade* Series in the copyright registration, only Time has standing under the Lanham Act to sue for defendants' use of the *Crusade* Series and Videos. (Def's Mot. At 2:25-3:2.) Aside from the fact that defendants offer *no* authority for this proposition, standing under the Lanham Act extends to any party that "has a reasonable interest to be protected against false advertising." *Lamothe v. Atlantic Recording Corp.*, 847 F.2d 1403, 1405 (9th Cir. 1988). In fact, Section 43(a) has been applied to various instances of false credits in motion pictures and in other entertainment products, including claims brought by non-authors. For example, the Ninth Circuit has upheld such a claim by an actor against those who removed his name from film credits and substituted a different name. *Smith*, 648 F.2d at 603, 607-608. Thus, the Lanham Act has been applied to a myriad of factual situations.[17] This is in keeping with the statute

17. *See, e.g., Lamothe*, 847 F.2d at 1405-1408 (musical composers could assert Lanham Act claim against co-authors for failing to give plaintiffs credit for co-writing songs); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993) (standing of singer under Lanham Act for claim based on defendant's imitating of plaintiff in commercial).

itself, which states: "*Any person* who shall affix, apply, or annex, or use in connection with any goods or services a false designation of origin . . . shall be liable to a civil action *by any person* who believes that he is or is likely to be damaged by the use of any such false designation or representation." 15 U.S.C. §1125(a) (emphasis added).

Here, each plaintiff contributed to the creation of, and/or has a financial interest in, the *Crusade* Videos that defendants pirated.[18] *All* the plaintiffs have a stake in revenues from sales of the *Crusade* Videos, and Fox and SFM also have an interest in the television rights to the *Crusade* Series for markets other than home video. (Moger Decl. Exh. B at p. 1; Exh. C at pp. 1-3; Exh. D at pp. 1-2; Reed Decl. ¶13, Exh. E at p. 1.) As a royalty interest that is damaged by false advertising constitutes a valid basis to assert a Section 43(a) claim, *PPX Enterprises, Inc. v. Audiofidelity, Inc.*, 746 F.2d 120, 124-26 (2d Cir. 1984) (parties with pecuniary interest in Hendrix albums may assert Lanham Act claim for false advertising), *each* plaintiff has an interest in the *Crusade* Videos that is protected under the Lanham Act.

Defendants' use of false credits in marketing *Campaigns* has infringed plaintiffs' rights under the Lanham Act. Since each plaintiff is involved in producing and/or distributing films and would benefit in its business from being associated with quality films, each has lost valuable goodwill. Defendants contend that there is no goodwill to lose because

18. Put briefly, Fox conceived of the original *Crusade* Series in the late 1940's, contracted with Doubleday for rights to the Book and with Time to produce the Series, financed the production of the 26 episodes, and participated in the creative process. (Feinstein Decl. ¶¶12-15, Exh. A; Reed Decl. ¶¶14-15, Exhs. D and E.) SFM originated the idea of restoring the *Crusade in Europe* Series, spearheaded the effort to find a copy of the tapes, and financed and supervised the restoration and repackaging process. (Moger Decl. ¶¶3-14; Exhs. A-D.) New Line is currently the distributor of the *Crusade in Europe* Videos. (Moger Decl. ¶¶8, 14; Exhs. B, D.) (*See also* Secs. II.f., V, *supra*.)

the *Crusade* Videos are in the public domain; however, this confuses the nature of the Copyright Act and the Lanham Act. Even if the *Crusade* Videos were free to be copied under the Copyright Act — which they are not, as the Book upon which the Videos are based is *not* in the public domain — the Lanham Act does *not* permit defendants to pass off *Campaigns* as their own. *Summit Machine Tool Manufacturing Corp. v. Victor CNC Systems, Inc.*, 7 F.3d 1434, 1438 (9th Cir. 1993) (Lanham Act claims are independent of Copyright Act claims). The right to make reproductions under the Copyright Act is *different* from the right to be protected from false designations of origin under the Lanham Act. Otherwise, the law would permit someone someday to distribute *Gone With The Wind* as a "Dastar Corporation Production," without giving credit to David O. Selznick or MGM, the original producer and distributor.[19]

Thus, defendants' conduct constitutes egregious reverse passing off under Section 43(a). Plaintiffs are entitled to summary adjudication of their Lanham Act claim, and defendants' motions for summary judgment and to dismiss must be denied.

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19. Defendants may claim that they gave plaintiffs sufficient credit because the packaging of *Campaigns* contains the statement "Contains Film Footage from the Previously Released CRUSADE IN EUROPE." However, this statement *only* appeared on at most a tiny fraction of the total units of *Campaigns* sold, and is no longer in use. Straw Decl. (filed under seal) Exh. A (Andersen 352:1-23), Exh. B , Exh.C (Hebert 77:9-81:7), Exh. D at p. 1. Furthermore, this statement does not specifically refer to any of the plaintiffs and incorrectly suggests that only a portion of *Campaigns* was taken from the *Crusade* Videos when, in fact, *Campaigns* is almost entirely a copy of the *Crusade* Videos.

VII. PLAINTIFFS ARE ENTITLED TO SUMMARY ADJUDICATION ON THEIR UNFAIR COMPETITION CLAIM UNDER CALIFORNIA LAW

Defendants' third cause of action is for unfair competition in violation of California Business & Professions Code §17200 *et seq.* and §17500 *et seq.* and of California common law. These statutory provisions impose liability for any "unlawful, unfair, or fraudulent business practice" and for false and misleading statements. Likewise, California common law on unfair competition provides redress for the same misconduct. As shown above, defendants have unfairly and unlawfully competed with plaintiffs by misappropriating plaintiffs' work and goodwill, and deceiving the public concerning the true origins of *Campaigns*. Therefore, defendants have engaged in unfair competition in violation of California statutory and common law, and plaintiffs are entitled to summary adjudication of their state law claims. *Summit Technology, Inc. v. High-Line Medical Instruments, Co.*, 933 F. Supp. 918, 942-43 (C.D. Cal. 1996) (same fraudulent conduct supporting Lanham Act claim also supports state unfair competition claims).

VIII. CONCLUSION

For all the foregoing reasons, defendants' motion for summary judgment and motion to dismiss should be denied, and plaintiffs' and counterdefendants' motion for summary adjudication of issues should be granted.

Dated: November 8, 1999

SETH ARONSON
MARC F. FEINSTEIN
NEIL S. JAHSS

DALE M. CENDALI
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Century Fox Film Corporation,
SFM Entertainment LLC and
New Line Home Video, Inc.

PLAINTIFFS' AND COUNTERDEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-7189 DT (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, and NEW LINE HOME VIDEO, INC., a New York corporation,

Plaintiffs,

v.

DASTAR CORPORATION, an Oregon corporation, ENTERTAINMENT DISTRIBUTING, an Oregon corporation, and MARATHON MUSIC & VIDEO, an Oregon corporation,

Defendants.

* * *

PLAINTIFFS' AND COUNTERDEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

[Local Rule 7.14.1]

Plaintiffs' and Counterdefendants' Cross-Motion

Date: December 6, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

Defendants' Motion

Date: November 22, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

After consideration of the papers in support of plaintiffs' cross-motion for summary adjudication of issues, and the oral argument of counsel, the Court determines that the following facts have been established as

UNCONTROVERTED FACTS

1. General Eisenhower was appointed commander of U.S. troops in Europe during World War II (the "War"), and later became Supreme Commander of the Allied Expeditionary Forces. (Eisenhower Decl. ¶3.)

2. As a result of his leadership roles, General Eisenhower's perceptions and view of the War were of unique historic importance. (Eisenhower Decl. ¶4.)

3. As early as 1944 and prior to his retirement from the military, General Eisenhower was asked to write his memoirs of his War experiences by book publishers, including LeBaron Barker, Jr., then Editor-in-Chief of Doubleday & Co., a predecessor of Doubleday, a division of Bantam, Doubleday and Dell Publishing Group Inc. ("Doubleday"). (Eisenhower Decl. ¶4; Power Decl. Exh. A.)

4. For years, General Eisenhower refused such offers because he thought that a book about his years in the War

would only exploit the work and sacrifices made by others. General Eisenhower, however, continued to be pursued by publishers who sought to change his mind. (Eisenhower Decl. ¶¶4 and 5; Power Decl. Exh. B.)

5. Douglas Black, President of Doubleday and friend to General Eisenhower, was the most convincing of the publishers and, with the help of William Robinson, Vice President of *The New York Herald Tribune* ("*The Tribune*") (which wanted to serialize excerpts of General Eisenhower's memoirs), persuaded General Eisenhower to write the memoirs. (Eisenhower Decl. ¶5; Vaughan Decl. ¶5.)

6. Although there was no formal, written agreement between Doubleday and *The Tribune*, they had a general understanding that they would work in conjunction with respect to the publishing and serialization of the Book. (Jahss Decl. Exhs. C and D).

7. Black and Robinson urged General Eisenhower to write his memoirs and emphasized to General Eisenhower the historical importance of a book that would chronicle his War years in his own words. (Eisenhower Decl. ¶5; Vaughan Decl. ¶5; Jahss Decl. Exh. A.)

8. When numerous books about the War came out that General Eisenhower believed were inaccurate, Black and Robinson pointed out to General Eisenhower that only he, by writing his memoirs, could set the record straight. (Eisenhower Decl ¶5; Vaughan Decl. ¶5; Jahss Decl. Exh. B.)

9. General Eisenhower finally acceded to Black's urgings and agreed to write his memoirs, *Crusade in Europe* (the "Book"), for Doubleday. (Eisenhower Decl. ¶5.)

10. Black was instrumental in getting General Eisenhower to write the Book. (Eisenhower Decl. ¶¶5 and 11.)

11. The general terms of Doubleday's agreement with *The -Tribune* to publish the Book were memorialized by Ken McCormick, Doubleday's Editor-in-Chief, in a December 23, 1947 letter to Robinson. (Power Decl. Exh. C.)

12. General Eisenhower and Doubleday had a firm arrangement for Doubleday to publish the Book by no later than January 1948. (Eisenhower Decl. ¶5; Jahss Decl. Exh. E.)

13. As early as February 2, 1948, plans were made for General Eisenhower to announce that Doubleday was going to publish his memoirs. (Power Decl. Exh. F.)

14. In May 1948, *The Tribune* disclosed to the public that Doubleday was going to publish the Book and that the *The Tribune* it was going to serialize excerpts from the Book in November of that year. (Jahss Decl. Exh. O.)

15. Because of tax considerations, General Eisenhower's contract with Doubleday was executed in October 1948 (the "Eisenhower/Doubleday contract"), more than six months after Doubleday commissioned General Eisenhower and more than six months after he had written the Book. (Jahss Decl. Exhs. F-K; Power Decl. Exh. D.).

16. In a December 20, 1947 letter to the Treasury Department, General Eisenhower stated that "certain publishers [had] urged [him] to write a personal memoir of the war years" and asked whether the money he earned from such an endeavor would be taxed at the capital gain rate (25%) or as ordinary income (75%). (Jahss Decl. Exhs. F, M.)

17. In letters dated December 22, 1947 and January 7, 1948, the Treasury Department notified General Eisenhower that it would tax his work on the Book at the reduced, long-term capital gain rate, as long as (1) he did not retain *any*

control over the use of the completed manuscript, and (2) his book contract was executed more than six months after he finished the manuscript. (Jahss Decl. Exhs. G, K.)

18. Because General Eisenhower did not finish the Book (*i.e.*, his first draft) until approximately March 24, 1948 (Jahss Decl. Exh. L, N; Power Decl. Exh. E), he could not put his deal with Doubleday in writing until after September 24, 1948 (*i.e.*, more than six months later) in order to get capital gains treatment. (Jahss Decl. Exhs. G, K.)

19. In December 1948, General Eisenhower and the IRS entered into a formal "closing agreement" in which General Eisenhower covenanted that, pursuant to the terms laid out in his prior correspondence with the Treasury Department (described above), he had conveyed to Doubleday "*forever . . . all rights of every nature* pertaining" to the Book. (Jahss Decl. Exh. L.)

20. At the time General Eisenhower agreed to write the Book for Doubleday, most authors did not write books for publishers on a work-for-hire basis. (Vaughan Decl. ¶10.) An author typically received a continuing royalty based on the sales of his or her book and retained an interest in the book's copyright. (Vaughan Decl. ¶10.) In contrast, in a work for hire situation, the publisher retained ownership in the book, without any further obligation to the author beyond payment, usually in the form of a lump sum paid at the outset. (Vaughan Decl. ¶9.)

21. Pursuant to the contract, General Eisenhower received a one-time, lump sum of $635,000 in lieu of ongoing royalties. (Eisenhower Decl. ¶6; Vaughan Decl. ¶¶9-10; Jahss Decl. Exh. L.)

22. Because Doubleday paid General Eisenhower a large sum of money upfront, it bore the entire risk in the event the Book sold poorly. (Vaughan Decl. ¶10.)

23. In return for taking the entire risk of the Book doing poorly, and paying General Eisenhower a substantial amount up front, Doubleday obtained *all* rights in the copyright to the Book on a work-for-hire basis. (Vaughan Decl. ¶10.)

24. The heirs of General Eisenhower have no continuing financial interest in the Book.[1] (Eisenhower Decl. ¶6.)

25. The arrangement between Doubleday and General Eisenhower for his later book *The White House Years* was more traditional: General Eisenhower retained the copyright and participated in the book's earnings by an advance and an ongoing royalty interest. (Vaughn Decl. ¶11.)

26. Consistent with General Eisenhower's retention of the copyright of *The White House Years*, General Eisenhower's son, John Eisenhower, renewed the copyright in 1991. (Vaughn Decl. ¶11, Exh. C.)

27. General Eisenhower had no previous experience as a book author. His writing had been chiefly confined to reports for the Army. (Vaughn Decl. ¶6; Eisenhower Decl. ¶8.)

28. General Eisenhower welcomed Doubleday's assistance and supervision in fashioning a book, especially in light of the pressure he was under to meet a Fall of 1948 deadline. (Vaughn Decl. ¶6; Eisenhower Decl. ¶8.)

29. Once General Eisenhower agreed to Doubleday's request to write the Book, he began working on the manuscript in January 1948, dictating the entirety of his memoirs to secretaries provided and paid for by Doubleday. (Eisenhower Decl. ¶7; Jahss Decl. Exh. P; Power Decl. Exhs. G, H, I.)

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[1] General Eisenhower died in 1969. (Def's Uncontroverted Fact No. 58.)

30. Doubleday, with the help of *The Tribune*, at the outset of the project mobilized an unusual effort involving substantial time, expense and high-level personnel to assist in the fashioning of the Book. (Vaughn Decl. ¶7.)

31. McCormick was responsible for supervising Doubleday's work in connection with the preparation of the Book. (Jahss Decl. Exh. P.) McCormick met with General Eisenhower as early as January 19, 1948, to provide editorial advice and to put together a team of senior editors from Doubleday and *The Tribune* to work with General Eisenhower on the Book, including Joe Barnes (*The Herald Tribune*'s foreign editor), Major Kevin McCann, Frank Price, and others. (Eisenhower Decl. ¶8-9; Vaughan Decl. ¶7; Jahss Decl. Exhs. Q, R; Power Exhs. I, J.)

32. McCormick and Joe Barnes made frequent trips (at least one a week) to Fort Myer in Virginia, where General Eisenhower resided and worked. It was an extremely close working relationship, with General Eisenhower producing the material and McCormick and Barnes providing significant comments and guidance. (Vaughn Decl. ¶7.)

33. The cooperation of General Eisenhower, McCormick and Barnes was very different from the typical editorial arrangement, when only one editor is involved and then generally much later in the process. (Vaughn Dec. ¶7.)

34. The Book had the benefit of an unusual and intense form of cooperation between General Eisenhower and McCormick and Barnes. (Vaughn Decl. ¶7.)

35. As early as January 1948, the Doubleday editorial team received various sections of General Eisenhower's manuscript as they were drafted (Jahss Decl. Exh. S; Power Decl. Exh. G), and provided commentary throughout 1948, prior to publication. (Jahss Decl. Exhs. S-V; Power Decl. Exhs. K-O.)

36. To assist in the editorial process, in January 1948, Doubleday engaged Colonel Arthur Nevins, an Army historian, to fact-check the Book. (Power Decl. Exhs. I, P.)

37. For Doubleday to provide the fact checking would be typical for a work made for hire, but would have been highly unusual in the ordinary, author-publisher arrangement, where the author retains the copyright. (Vaughn Decl. ¶8.)

38. In March 1948, Doubleday further arranged (and paid) for Rafael Palacios to create the Book's maps (Power Decl. Exhs. I, Q), and later that year, for renowned photographer Edward Steichen of the Museum of Modern Art to select the Book's photographs (Power Decl. Exh. R). Doubleday also paid for various other expenses incurred in connection with the editorial work done on the Book. (Vaughan Decl. ¶8; Power Decl. Exh. S.)

39. Doubleday also worked on the promotion and manufacture of the Book long before the Eisenhower/ Doubleday contract was executed and the Book was published. For example, as early as January 26, 1948, Doubleday developed specs concerning the Book's price, size, and publication date. (Power Decl. Exh. T). And as early as January 20, 1948, Doubleday and *The Tribune*, with General Eisenhower's cooperation, worked on a complex marketing and sales plan for the Book. (Jahss Decl. Exh. W; Power Decl. Exhs. U, V, Z.)

40. Doubleday published the Book on November 22, 1948, with the first of 30 excerpts appearing in the November 7, 1948 edition of *The Tribune*. (Jahss Decl. Exh. Y; Power Decl. Exhs. I, W.)

41. General Eisenhower was pleased with the Book (Eisenhower Decl. ¶10; Jahss Decl. Exh. X.), which turned out to be both a critical and commercial success. (Eisenhower Decl. ¶11; Vaughan Decl. ¶13; Power Decl. Exhs. X, Y.)

42. In 1948, Doubleday obtained certificates of registration for the copyrights to the Book and *The Tribune* excerpts, listing itself as the copyright claimant. (Jahss Decl. Exhs. Z, AA.) Doubleday timely renewed those copyrights in 1975 as the "proprietor of copyright in a work made for hire." (Jahss Decl. Exhs. BB, CC.)

43. Because General Eisenhower's manuscript was commissioned by and sold outright to Doubleday, his son John, as executor of General Eisenhower's estate, never believed that he or his father's other heirs had any ownership interest in the renewal copyright for the Book. (Eisenhower Decl. ¶12.)

44. Consequently, General Eisenhower's heirs never sought to renew the Book's copyright because they believed it was Doubleday's prerogative, as owner of all rights to the Book, to do so. (Eisenhower Decl. ¶12.)

45. Until this litigation, no one – including the Eisenhower estate – has ever challenged the validity of Doubleday's renewal copyrights to the Book and *The Tribune* excerpts. (Vaughan Decl. ¶12.)

46. By agreement dated November 20, 1948, Doubleday granted to Twentieth Century Fox Television Productions, Inc. (the "Fox Division") the sole and exclusive television rights in the Book. (Reed Decl. ¶14, Exh. D.)

47. Peter Levathes, Vice President of Twentieth Century Fox Film Corporation in the late 1940s arranged for and oversaw the production of the television series to be made from the Book (the "*Crusade in Europe* Series"). (Feinstein Decl. ¶12.) Levathes, on behalf of Fox Division, negotiated an agreement (the "Fox/Time agreement") with Time, Incorporated's *March of Time* news unit ("Time"), to produce the *Crusade in Europe* Series. (Reed Decl. ¶15, Exh. E)

48. Levathes did not intend the Series to be simply another piece on the War; he conceived it as a documentary on *General Eisenhower's story* as told by the General. (Feinstein Decl. ¶10.)

49. Levathes informed Time during the negotiations with Time to produce the *Crusade in Europe* Series had to be faithful to the Book and had to convey General's Eisenhower's view of the War as captured in the Book. (Feinstein Decl. ¶13.)

50. The Fox/Time agreement provides that the *Crusade in Europe* Series must be based upon or illustrating the work entitled "CRUSADE IN EUROPE" by Dwight E. Eisenhower. (Reed Decl. ¶15, Exh. E at par. 1(a).)

51. The Fox/Time agreement gave the Fox Division and Doubleday the right to review the script and film for individual episodes and Time agreed to eliminate any portion of the script and any original photography that was determined to adversely affect General Eisenhower's reputation. (Reed Decl. ¶15, Exh. E at par. 1(b)-(d).)

52. Creating the *Crusade in Europe* Series was a major project that involved not only developing scripts for more than two dozen separate one-half hour episodes, but also selecting and assembling footage, preparing connecting materials, doing a narration, and deciding on and incorporating music. (Feinstein Decl. ¶5.)

53. Levathes worked closely with Time on the adaptation of the Book into a television series and on the creation of the 26 individual episodes of the *Crusade in Europe* Series. Levathes reviewed and commented on the scripts and the pictures and oversaw other aspects of the production process. The final work was the result of a close collaboration between the Fox Division and Time. (Feinstein Decl. ¶5.)

54. Ultimately, the *Crusade in Europe* Series was very closely based on and illustrated the Book. (Feinstein Decl. ¶16.)

55. The *Crusade in Europe* Series followed the Book's structure, format and content. (Feinstein Decl. ¶16; Reed Decl. ¶7-12.)

56. The *Crusade in Europe* Series selected and produced footage that captured the images described in the Book. (Feinstein Decl. ¶16.)

57. The *Crusade in Europe* Series conveyed General Eisenhower's perspective on the War as articulated in the Book. (Feinstein Decl. ¶11.)

58. The Fox Division reacquired the television rights in the Book from Doubleday for a period of seven years through a July 12, 1988 agreement (the "1988 Doubleday/ Fox agreement"). (Reed Decl.¶16, Exh. F.)

59. When Fox reacquired the television rights in the Book pursuant to the 1988 Doubleday/Fox agreement, Fox also acquired the exclusive right to distribute the *Crusade in Europe* Series on *video*, and to license and sublicense others to do the same. (Reed Decl. ¶16, Exh. F).

60. On March 11, 1993, the 1988 Doubleday/Fox agreement was amended to extend the term of the Fox Division's exclusive license to fourteen years. (Reed Decl. ¶17, Exh. G.) This amendment was recorded with the U.S. Copyright Office on February 13, 1996. (Reed Decl. ¶17.)

61. By agreement dated June 22, 1988 (the "Fox/SFM agreement"), the Fox Division granted to SFM Entertainment LLC ("SFM") for a period of seven years, the right to act as its exclusive sales agent and distributor of the *Crusade in Europe* Series in all media, including video, and to license

and sublicense any parties to do the same. (Moger Decl. Exh. C.) The term of the Fox/SFM agreement, which was recorded with the U.S. Copyright Office on February 13, 1996, was automatically as extended to fourteen years upon the March 11, 1993 amendment of the 1988 Doubleday/Fox agreement. (Moger Decl. Exh. C.)

62. By agreement dated July 27, 1984 (hereinafter the "SFM/New Line agreement"), which was amended on October 27, 1986, May 12, 1987, and December 15, 1991, SFM granted to Embassy Home Entertainment ("EHE"), and thus to New Line Home Video, Inc. ("New Line"), as EHE's successor in interest, an exclusive license to distribute the *Crusade in Europe* Series on video. (Moger Decl. Exhs. B and D.)

63. In 1980, SFM entered into an agreement with Time-Life Television, a division of Time-Life Films Inc., to purchase its *March of Time* library, which was to have included the *Crusade in Europe* Series. (Moger Decl. ¶¶ 4 and 6.)

64. In 1981 or 1982, SFM learned that the negatives of the *Crusade in Europe* Series were missing from the *March of Time* library. (Moger Decl. ¶¶6 and 7.)

65. After an extensive search spanning five or six years, SFM located and purchased the tapes and began restoring the *Crusade in Europe* Series so it could be repackaged for distribution on video. (Moger Decl. ¶¶9 and 10.)

66. The copies of the tapes of the *Crusade in Europe* Series were scratched and damaged. (Moger Decl. ¶10.)

67. Because the negatives were old and in rough condition, SFM sent them to a special laboratory to be restored. (Moger Decl. ¶10.)

68. The negatives for the titles and credits were missing, so a new set was prepared in 1989 to match a written list of the original titles and credits. (Moger Decl. ¶10.)

69. SFM incurred significant expense in preparing the new titles and credits to match the classic appearance of the rest of the Series. (Moger Decl. ¶10.)

70. Resurrecting the *Crusade in Europe* Series also involved fixing the soundtrack and standardizing the opening sequences of the individual 26 episodes. (Moger Decl. ¶10.)

71. The total cost of restoring the *Crusade in Europe* Series was approximately $75,000. (Moger Decl. ¶10.)

72. In conjunction with New Line, SFM had the tapes repackaged as videos (the "*Crusade in Europe* Videos" or "Videos"). The *Crusade in Europe* Videos were a direct reproduction of the *Crusade in Europe* Series. (Moger Decl.¶13.)

73. The credits for the Videos gave clear credit to the actual creators of the *Crusade in Europe* Series and the Videos. For instance, credit is given to "New Line Home Video," "A March of Time Production By Arrangement with 20th Century Fox," "Eisenhower's Crusade in Europe Based on the Book by Dwight D. Eisenhower" and "SFM." (Moger Decl. ¶14.)

74. In 1993, pursuant to the 1988 Doubleday/Fox, Fox/SFM and SFM/New Line agreements, New Line first distributed the *Crusade in Europe* Series in a six-part series of videocassettes under the title *Crusade in Europe*. (Moger Decl. ¶14; Not. of Lodging Exh. A.)

75. The packaging of each *Crusade in Europe* video displays the following notice: "The Exclusive Picturization of General Dwight D. Eisenhower's book CRUSADE IN

EUROPE published by Doubleday & Company Inc. © 1948 Doubleday & Company Inc." (Not. of Lodging Exh. A.)

76. New Line, as EHE's successor in interest, continues to offer *Crusade in Europe* videos for sale today. (Moger Decl. ¶¶13-14.)

77. Dastar first began producing videos in 1995. (Andersen 43:21 – 44:2.)

78. In April 1995, Lanny Tarter, a former freelance video producer who became Dastar's director of video acquisitions in September 1995, and Norman Andersen, President of Dastar, spoke about expanding Dastar's product line, which had been exclusively music CDs, into video. (Tarter 30:8-23, 41:4-7; 43:1-9; Andersen 69:10-19.)

79. In looking for a first project to release on video, Tarter and Andersen spoke about the *Crusade in Europe* Series, which they both remembered watching when they were growing up. (Tarter 31:20 – 32:9; Andersen 66:22 – 67:1.)

80. Tarter and Andersen thought a video using the *Crusade in Europe* Series would sell well because Tarter previously had produced various successful war videos, and 1995 marked the 50th anniversary of the end of World War II. (Tarter 34:8-24; Andersen 72:9-24.)

81. The first video that Dastar produced was *Campaigns in Europe*. (Andersen 44:12-16, 70:16-20.)

82. As Dastar's director of video acquisitions, Tarter is generally in charge of acquiring and producing Dastar's video product. (Tarter 41:8-14.)

83. To create *Campaigns in Europe*, Tarter purchased eight beta cam tapes of the *Crusade in Europe* Series of

sufficient quality so as to be able to reproduce them *en masse*. (Tarter 44:11 – 46:14; Andersen 298:21 – 299:7.)

84. To make *Campaigns in Europe*, Tarter copied the *Crusade in Europe* Series in its entirety, making only the following changes: (a) with the assistance of a studio called L.A. Videograms, Tarter substituted a new opening title sequence, credit page and final closing for the original versions that appeared in the *Crusade in Europe* Series; (b) Tarter substituted 26 new chapter-title sequences that corresponded precisely to the original 26 chapter-title sequences of the *Crusade in Europe* Series and subsequent videos (Tarter 52:12 – 55:2); (c) Tarter deleted any reference to the Book, including images of the Book that had appeared at the beginning of each of the 26 chapters of the *Crusade in Europe* Series (Tarter 55:19-56:22 and 76:24 – 77:13); and (d) Tarter moved the *Crusade in Europe* Series' "recap" to the beginning of *Campaigns in Europe*, and retitled it as a "preview." (Tarter 76:21 – 77:5.)

85. Other that what is listed above, in Uncontroverted Fact paragraph 84, Tarter did not do anything else to remove or alter any aspect of the *Crusade in Europe* Series in making *Campaigns in Europe*. (Tarter, 76:24 – 77:19; 82:4-10.)

86. The footage from the *Crusade in Europe* Series that was copied to create *Campaigns in Europe* thus contains the original narration from the *Crusade in Europe* Series that was taken from the Book. (Tarter 80:8-20.)

87. With the exception of the opening title sequence, chapter-heading sequences, credit page, and final closing of *Campaigns in Europe*, the entirety of the seven hours of *Campaigns in Europe* is taken from the *Crusade in Europe* Series. (Andersen 194:1-8.)

88. *Campaigns in Europe* was released in October 1995. (Andersen 44:12-16, 70:16-20.)

89. *Campaigns in Europe* contains text taken from the Book. There are 853 sentences (including both complete sentences and parts of sentences) in the Book that appear in *Campaigns in Europe*; 244 pages of the Book, or 51.2% (out of a total of 477 pages of the Book), that contain text directly copied or very closely paraphrased in *Campaigns in Europe*; 2,211 lines of text in the Book, or 11.6% (out of a total of approximately 19,000 lines of text in the Book) that contain text directly copied or very closely paraphrased in *Campaigns in Europe*. (Reed Decl. ¶5.)

90. The text that *Campaigns in Europe* copied from the Book generally consists of General Eisenhower's own thoughts and expressions about the War, and not merely bare historical facts. (Reed Decl. ¶6.)

91. The Book and *Campaigns in Europe* follow the same structure, format, content, sequencing, and tone (Reed Decl. ¶7.)

92. Both the Book and *Campaigns in Europe* are organized around the same six subjects: (1) the build-up of United States armed forces before World War II and the entry of the U.S. into the War; (2) the Allied campaign in North Africa; (3) the Allied campaign in Italy; (4) the Allied campaigns in France and Germany leading to victory in Europe; (5) the involvement of Russia in the War in Europe; and (6) the post-War period. (Reed Decl. ¶7.)

93. The Book, which is not simply a chronological history of the War, moves back and forth in time as it addresses different Allied operations, different battles, selected historical figures known to General Eisenhower, and other events and subjects. (Reed Decl. ¶8.)

94. Following the same format as the Book, *Campaigns in Europe* also moves back and forth in time between such events and subjects and is not a purely chronological account of the War. (Reed Decl. ¶8.)

95. The Book tells of General Eisenhower's personal and unique story of World War II and is organized around his personal experiences and perspectives, the issues and decisions he faced, and the persons with whom he had contact or who he believed had a profound influence on events. (Reed Decl. ¶9.)

96. Although in a truncated form, *Campaigns in Europe* repeats General Eisenhower's personal story, following the same circuitous route as the Book and adopting the same tone. (Reed Decl. ¶9.)

97. The sequencing of the topics in the Book is roughly the same as that in *Campaigns in Europe*; many of the same topics are juxtaposed and recounted in the same order, and the overall presentation of the War is the same. (Reed Decl. ¶10, Exh. C.)

98. While the Book depicts many famous moments of the War such as the D-Day Invasion, the Book also depicts much less well known events that General Eisenhower decided to include. Such less conspicuous events described in the Book are, however, reproduced in *Campaigns in Europe*, both in the narration *and* in the War footage selected to illustrate it. As examples, the Book tells the story of the construction of the "Mulberry" harbors off the coast of France and the destruction of one of those harbors in a hurricane;. the Book discusses the training of the U.S. troops, and General Eisenhower focuses on certain troop maneuvers that were held in Louisiana in September 1941; the Book touches on such less notable events as the death of Admiral Darlen, a French officer who was involved in conflicts in North Africa. Although presenting the War through visuals, *Campaigns in Europe* relies on all these same topics — the "Mulberry" harbors, the Louisiana troop maneuvers in 1941, and Admiral Darlen's death — and on many other less prominent topics discussed in the Book. (Reed Decl. ¶11.)

99. In addition to the voluminous copying of much of the literal text of the Book in *Campaigns in Europe*, the visual images that are shown in *Campaigns in Europe* similarly mirror the many choices that General Eisenhower made in organizing his Book and in deciding what aspects of his War experiences to emphasize and how. (Reed Decl. ¶12.)

100. The credits for *Campaigns in Europe* identify Andersen as executive producer, Barbara Kaye (Tarter's former assistant) as *associate* producer, and Tarter as producer. (Tarter 49:8-11, 66:6 – 67:17; Not. of Lodging Exh. B.)

101. Dastar deleted all references to the fact that *Campaigns* was based on the Book and all of the other credits that appeared in the *Crusade in Europe* Series. (Andersen 132:3-10, 195:19-24.)

102. There are no credits in the *Campaigns in Europe* Series that would inform viewers that it was taken from the *Crusade in Europe* Series. (Tarter 75:18 – 76:4; Not. of Lodging Exh. B.)

103. There is nothing on the packaging for *Campaigns in Europe* that gives credit to General Eisenhower or any of the plaintiffs concerning the content of *Campaigns in Europe*; the only entities given credit are Dastar and Marathon Music & Video (d.b.a. of Dastar). (Tarter 176:8 – 177:11; Andersen 189:24 – 191:10, 198:18 – 199:4; Answer to Complaint ¶ 10.)

104. Dastar released a new version of *Campaigns in Europe*, in which the only change in content was the addition of "wrap-around" segments narrated by Oregon radio personality Dale Reed that appear at the beginning of each tape, lasting approximately 2 to 3 minutes each. (Tarter 114:19 – 115:7, 118:21 – 120:12; Not. of Lodging Exh B.)

105. Both Tarter and Andersen were aware at the time they originally saw the *Crusade in Europe* Series, and in 1995 when they decided to copy it, that the Series was based on the Book. (Tarter 32:18 – 33:11; Andersen 67:2 – 68:18.)

106. Tarter did some research and concluded that the *Crusade in Europe* series was in the public domain. (Tarter 39:4-21).)

107. Neither Tarter nor Andersen conducted an investigation concerning the copyright status of the Book in 1995, or at any other time prior to the commencement of this litigation. (Tarter 39:4-21; Andersen 72:-5.)

108. No one at Dastar consulted with a lawyer to determine whether the release of *Campaigns in Europe* would infringe anyone's rights. (Andersen 70:5-25.)

109. Sometime after July 15, 1997, Marathon received a letter from plaintiffs requesting, among other things, that Marathon (1) immediately cease and desist from distributing *Campaigns in Europe*, (2) surrender all copies of *Campaigns in Europe* and account for all of its sales; and (3) inform plaintiffs of the means that Marathon obtained copies of the materials used in *Campaigns in Europe*. (Andersen 375:9 – 376:7; Jahss Decl. Exh. EE.)

110. Marathon did not comply with plaintiffs' cease and desist requests, nor did it consult with an attorney concerning the contents of plaintiffs' July 15, 1997 letter (even though it later stated to plaintiffs that did). (Andersen 379:19 – 381:1, 381:20 – 382:3; Jahss Decl. Exh. FF.)

111. On July 29, 1997, EDI (d.b.a. of Dastar) sent a letter responding to plaintiffs July 15, 1997 letter, in which defendants requested that plaintiffs "provide [them] with the appropriate documentation in support of [their] assertion to be the exclusive distributors of the *Crusade in Europe* videos. (Andersen 27:16-21; Jahss Decl. Exh. FF.)

112. On approximately September 17, 1997, plaintiff New Line sent a letter responding to EDI's July 29, 1997 letter, in which New Line stated that it was compiling the documentation that EDI requested, and reiterated plaintiffs' request that EDI provide plaintiffs with information concerning the source of the materials that were used to create *Campaigns in Europe*. (Jahss Decl. Exh. GG.)

113. EDI did not provide plaintiffs with the information that plaintiff New Line requested in its September 17, 1997 letter to EDI. (Andersen 389:2-19.)

114. On December 18, 1997, plaintiffs sent defendants the requested documentation requested in EDI's July 29, 1997 letter establishing plaintiffs' chain of title to the *Crusade in Europe* videos. (Jahss Decl. Exh. HH.)

115. Around the time that plaintiffs filed this lawsuit on September 2, 1998, Dastar asked Eric Kulberg of Universal Media Inc. to perform a copyright search on the Book. (Andersen 402:3 – 403:13.)

116. In a September 22, 1998 letter to Tarter, Kulberg reported that "(i)t appears that Doubleday & Company has a *solid* copyright on this work and will hold it at least until 2023." (emphasis added) (Jahss Decl. Exh. II.) While Kulberg noted in his letter that Fox did not renew the copyrights in the *Crusade in Europe* series, he concluded that "(i)n any case, the underlying literary rights appear to be intact." (Jahss Decl. Exh. II.)

117. Dastar continued to sell *Campaigns in Europe* after receiving Kulberg's September 22, 1999 letter. (Andersen 404:14-18.)

118. Sometime in early 1999, after the lawsuit was filed, Tarter and Andersen discussed doing a "revamped" version of *Campaigns in Europe* with a new soundtrack, new

narration, and new interviews. (Tarter 160:12-23, Andersen 144:8 – 146:10.)

119. In creating the new version of *Campaigns in Europe*, which was scheduled to be completed in October 1999, Tarter and Andersen considered deleting language from the narration of *Campaigns in Europe* that came from the Book. (Tarter 164:15-20; 167:7-10.)

120. In preparing a new narrative for the revamped version of *Campaigns in Europe*, Andersen's son David compared the existing narration to the content of the Book. (Andersen 157:17-20.)

121. The only changes to be made to the revamped version of *Campaigns in Europe* were the incorporation of a new soundtrack, new narration, new music, new special effects and the insertion of new interviews. (Tarter 162:22-163:1.)

Dated: November 8, 1999

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EXHIBITS KK AND LL FROM THE DECLARATION OF NEIL S. JAHSS IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTER-DEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-7189 DT (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, and NEW LINE HOME VIDEO, INC., a New York corporation,

Plaintiffs,

v.

DASTAR CORPORATION, an Oregon corporation, ENTERTAINMENT DISTRIBUTING, an Oregon corporation, and MARATHON MUSIC & VIDEO, an Oregon corporation,

Defendants.

* * *

DECLARATION OF NEIL S. JAHSS IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTER-DEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

Plaintiffs' and Counterdefendants' Cross-Motion

Date: December 6, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

Defendants' Motion

Date: November 22, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Dickran Tevrizian

DEPOSITION OF LANNY LEE TARTER
JULY 28, 1999

[Commencing at page 30]

A. I believe it was the name American Stereo.

Q. How long have you known Mr. Andersen?

A. Approximately 25 years.

Q. Do you consider him a friend?

A. Yes.

Q. Did there come a time when you became involved in any video projects on behalf of Dastar Corporation?

A. Yes, there was.

Q. When did that take place?

A. Approximately four years ago.

Q. Was that in approximately 1995?

A. That is correct.

Q. How did that come about?

A. He and I were talking about the possibility of he expanding his company and going from music CDs into video. We talked about prospective product that he could get involved in.

And that's the genesis of the conversation.

Q. Did he first raise the idea with you, or did you suggest the idea to him?

[31] MR. HYMAN: Objection. Assumes facts not in evidence, that either of those were the case.

Go ahead, please.

A. I don't remember where it started.

BY MS. CENDALI:

Q. Did — was Mr. Andersen your primary contact in 1995 at Dastar with regard to video projects?

A. That is correct.

Q. Did Mr. Andersen ask you to do anything on Dastar's behalf at that time?

A. With reference to this particular product?

Q. Well, I'm just trying to get the chronology straight. I understand that you had an initial discussion about whether Dastar was interested in getting involved in the video business.

What happened next in the stage of your working with Dastar with regard to video projects?

A. We both talked about the — a series that we both remembered in our youth called Crusade in Europe. And I looked in my book [32] which we discussed before, and I had noted to him that it appears to be in the public domain. It was not renewed.

And that was the initial conversation about it.

Q. Do you remember seeing the documentary series Crusade in Europe when you were a youth?

A. Yes, I do.

Q. Do you understand that it's based on the book by General Eisenhower, Crusade in Europe?

A. Yes.

MR. HYMAN: If the question is — Objection. Time frame. Is the question does he understand today?

BY MS. CENDALI:

Q. Do you understand today that it was based on General Eisenhower's book?

A. That is correct.

Q. Did you understand that prior to today as well?

A. I believe so, yes.

Q. Did you understand that in 1995?

A. Yes.

[33] Q. Did you understand that Crusade in Europe was based on General Eisenhower's book when you first saw the — saw Crusade in Europe when you were a youth?

A. I believe so, yes.

Q. How did you know that?

A. I believe each show started off with Eisenhower talking about it and then showing a portion of the book. Certainly, the cover of the book had his picture on it, and some paragraphs.

Q. What did you think of the quality of Crusade in Europe?

MR. HYMAN: Objection as to time frame.

Go ahead.

BY MS. CENDALI:

Q. In 1995.

A. In 1995? Well, I'd seen it much earlier — is that what you're referring to? — on television.

Q. Well, let me back up and take it step by step.

A. Please.

Q. Did you first see it on television [34] in the 1950s?

A. That is correct.

Q. At that time did you think it was a high-quality documentary?

A. At the time I — it was black and white, and I was happy to get it with my television set.

Q. Why did you think in 1995 that that might be an interesting project to release on video?

A. Because I had done quite a few war shows, and they seemed to be selling and paying me royalties, so I mentioned that, that war sells.

Q. And did you think that Crusade in Europe was a high-quality documentary that people might like to buy?

A. Well, I — it was a chronological history of World War II, which I was interested in, and that's the angle I was coming at.

Q. Now, you mentioned that you — you referred to your book and that you saw that the copyright had not been renewed, I believe. That is correct?

A. That is correct.

* * *

[39] maybe it may turn out that one of these documents is the copyright search that you were alluding to.

Did you make any inquiries, prior to the release of Campaigns in Europe in 1995, as to the copyright status of General Eisenhower's book, Crusade in Europe?

A. No. I had no knowledge of that.

Q. Prior to the commencement of this lawsuit, which I'll represent to you was commenced in September of 1998, did you or anyone else, to your knowledge, on behalf of Dastar make any inquiries as to the copyright status of General Eisenhower's book, Crusade in Europe?

MR. HYMAN: And again, though he's not here to designate — he's not here designated as that witness, go ahead and — go ahead and answer.

A. I don't remember any — any work being done on the book.

BY MS. CENDALI:

Q. When was the first time, to your knowledge, any work was done investigating the copyright status of General Eisenhower's book?

* * *

[41] Q. Okay. What was your — Strike that. It isn't actually stricken by the fact lawyers say that.

But what is your current title with Dastar Corporation?

A. My current title is director of acquisition — video acquisitions.

Q. What do your responsibilities and duties include?

A. Generally, the — in charge of the video division: acquiring product, supervising production of the product, assisting graphics in product, and turning it over to the sales department.

Q. To whom do you report, if anyone?

A. Norm Andersen.

Q. How many people work in the video unit at Dastar?

A. Between five and seven, depending on what projects are happening.

Q. Does Dastar create any video projects from scratch?

MR. HYMAN: Objection as to ambiguity: "from scratch." Go ahead and answer.

* * *

[43] Q. Just to get the employment situation straight, has your title changed since — at all since the time that you joined Dastar as a full-time employee?

A. No.

Q. Do you recall the date that you joined Dastar?

A. I believe I joined Dastar in September of '95. I think — I believe — yes. And we had — we had a rather long move-in, and I don't think I started to work until October of '95.

Q. Did you join Dastar as a result of the Campaigns in Europe project?

A. No. I joined Dastar because of my reputation as a valid producer and my knowledge of Norm and his knowledge of mine and his plans for video as part of his company.

Q. Let's go back to the creation of Campaigns in Europe. You testified as to your initial conversations with Mr. Andersen.

Could you please describe for me, focusing first on the version of Campaigns in Europe that was initially released in October of 1995, how you generally went about producing [44] Campaigns in Europe.

MR. HYMAN: My objection to the question is with regard to the preamble, "let's go back," and also as to what he testified, as objectionable.

You can go ahead and answer the question.

MS. CENDALI: Let me ask a new question.

BY MS. CENDALI:

Q. Could you please briefly describe for me the general procedure you followed in 1995 in creating Campaigns in Europe.

A. I inquired from my various sources about the availability of the 16-millimeter films on Crusade in Europe.

After getting various answers and various prices, I finally selected somebody who had the product.

Q. Did you —

MR. HYMAN: Did you finish your answer?

THE WITNESS: Yes.

MR. HYMAN: Okay.

BY MS. CENDALI:

[45] Q. Do you recall the name of the entity that had the product?

A. The name of the entity was Ray Atherton, Wavelength Video.

Q. What was it that you purchased from Wavelength Video?

A. He gave me eight beta cam tapes consisting of 25 or 26 episodes. I don't remember exactly.

Q. Episodes of Crusade in Europe.

A. Episodes of the television show. That's correct.

Q. Were these master recordings?

MR. HYMAN: Objection as to the definition of the word "master recording."

BY MS. CENDALI:

Q. Okay. When you stated that you purchased —

MR. HYMAN: As ambiguous and indefinite.

Go ahead, please.

BY MS. CENDALI:

Q. Are you familiar with the term "master recording"?

A. Yes.

[46] Q. What do you understand that term to mean?

A. In this particular case, is the quality sufficient enough to go into production with.

Q. And did you purchase from Wavelength Video copies of Crusade in Europe of sufficient quality as to be able to mass reproduce them?

A. That is correct.

Q. Do you recall approximately how much you paid Wavelength Video for this?

A. I paid Wavelength Video $4500 plus a series of crime scene photographs that I had that he needed for other projects.

Q. When you said that plus the crime scene photos, were those photos that you had in your own personal possession?

A. That is correct, yes.

Q. Did you ask — did Mr. — Excuse me.

Did Wavelength Video give any representations or warranties to you with regard to the copyright status of Crusade in Europe and the ability to reproduce it?

MR. HYMAN: Objection as to the use of the word "warranty" as a legal . . .

* * *

[49] I'll just look on. Go ahead.

Number 5.

BY MS. CENDALI:

Q. Can you identify Plaintiffs' Exhibit 5, Mr. Tarter?

A. Yes. This is a check from EDI to Method Songwriting at my office.

Q. What services did Method Songwriting provide EDI?

A. Method Songwriting is owned by Barbara Kaye, who is my assistant.

And this particular situation was I was going through a personal bankruptcy and I literally had no money, so a check was sent to Barbara's company. She in turn had the ability to cash the check, and she gave me the money I needed to give to Ray.

Q. I see. So Dastar didn't actually purchase the master recordings from Method Songwriting; Method Songwriting was the conduit by which those recordings were purchased from Wavelength Video. Is that right?

MR. HYMAN: Objection as to calls for a legal conclusion.

You can go ahead and testify.

* * *

[52] A. Not officially. I — the $6200 was the gross. I gave him $4500. I probably blew $500 living, and I let Barbara keep a thousand dollars, since I hadn't paid her in three months.

Q. Okay. Now, what, if anything, did you do with the master recordings once you received them from Wavelength — Excuse me. Is it Wavelength or —

A. Wavelength. Wavelength.

Q. Okay.

A. The next step was to go to my video editor, Larry Rosen at L.A. Videograms, where we plotted to put the puzzle together.

Q. What is L.A. Videograms?

A. It is a beta cam video studio on Overland Boulevard in Los Angeles.

Q. What types of services did L.A. Videograms supply to you with regard to the video set that became Campaigns in Europe?

A. L.A. Videograms and myself, we — the first thing we did was to inventory the eight beta cam masters that we

had and made a paper edit where everything was on these particular tapes.

[53] Q. What do you mean by a paper edit?

A. The equipment would — has a readout on it which says where everything was, and we would see where chapter 1 was or a particular chapter we wanted.

And I would make a notation on a separate piece of paper that, at a certain number from X to Y, there is this complete chapter that I would like.

Q. What did you do with these paper edits?

A. I had given the paper edits, complete with other things, to Ray.

MR. HYMAN: Ray whom?

THE WITNESS: Ray Atherton.

BY MS. CENDALI:

Q. Now, Ray is, again, at Wavelength Video?

A. That is correct.

Q. Again, just to go back to understand what L.A. Videograms did, what exactly did they do? Did they edit portions of Crusade in Europe at your direction?

MR. HYMAN: Objection. Compound as to two questions.

[54] Go ahead and answer.

A. At L.A. Videograms we proceeded to create 26 openings, title page openings, for the 26 chapters.

We added photo grabs. We grabbed the photos within the previously discussed film and put them in the title pages. We also put chirons on there which describe the chapter.

We also put it through a special process to give it a Venetian blind look so that the titles would like they're moving.

We subsequently added music and radio shows in addition to other work.

Q. The music and radio shows, was that in relation to the title sequences preceding each of the chapters?

A. That is correct.

Q. And the other work that L.A. Videograms did, that was in helping you create an initial title page for the documentary series? Correct?

A. We created a — well, he did. Created a two-dimensional opening title sequence in color to start the show off.

And then we created, as I said, the [55] 26 different chapters, and then we created a credit page and then a final closing.

Q. Do you recall whether the credit page was created for use in the initial release of Campaigns in Europe?

A. Yes, it was.

Q. So that there were credits in the initial release of Campaigns in Europe?

A. Our credits, that's correct.

Q. And when you say — by "our credits," what do you mean by that?

A. The film that I used had no credits on it at all, so there was nobody that I can give credit to except ourselves.

Q. What do you mean by the fact the film you used had no credits?

A. The sources, the eight beta cam sources.

Q. Am I correct that at the beginning of each chapter sequence in Crusade in Europe, there was an image of General Eisenhower's book Crusade in Europe?

A. As best I remember how each show started, each show started with a push — are you familiar with the term "push": a camera [56] moving in? — on the Statue of Liberty. And then after the Statue of Liberty, I believe it said "Crusade in Europe."

And then after the Crusade in Europe, it had the emblem of the SHAPE headquarters, which was Eisenhower's headquarters, Supreme Headquarters Allied, in Europe.

And then there was the picture of the book and Eisenhower's picture on the book. That's how I remember.

Q. Isn't it true that in addition to Eisenhower's book being depicted in the beginning sequence of Crusade in Europe, his book was also shown at the beginning of each chapter sequence?

A. That is correct.

Q. And am I correct that you elected to delete the images of General Eisenhower's book from the footage you received from Wavelength Video?

A. That is correct.

MR. HYMAN: It's about 12:35, so I'm thinking we would like to take lunch in about five minutes.

* * *

[66] A. I don't believe so.

Q. What was your purpose in creating the credit list?

A. Just to give it an updated — an identity as a finished product.

Q. What do you mean by an identity?

A. Well, all products should have credit rolls on them.

Q. Is it — What did you intend to convey to viewers by these credits?

A. I never thought about the viewer. I just thought it should be a finished package which should have credits.

Q. What do you believe this credit list communicates to viewers?

MR. HYMAN: Objection. Assumes he has a belief the credit list communicates something to viewers and also, to some extent, argumentative. The prior question was "What did you intend to convey to viewers?" The witness said he never thought about the viewers or thought about that.

So it's been asked and answered. Objection: Argumentative, assumes facts not in evidence.

[67] Go ahead and answer if you're able.

A. I have no idea what the viewer was thinking.

BY MS. CENDALI:

Q. What does it mean to you?

A. Personally speaking?

Q. Yes.

A. That these people are involved in the production of this product and they're taking credit for it.

Q. And the individual — the individuals listed are Norman Andersen, executive producer; Barbara Kaye, associate producer; and yourself as producer. Is that correct?

A. Yes.

MR. HYMAN: Objection. Exhibit No. 6 is the best evidence of what it does state.

BY MS. CENDALI:

Q. What — why was Mr. Andersen given the title executive producer?

A. Well, in Hollywood, quite frankly, the people who put up the money are the . . .

* * *

[69] . . . producer's role is.

Q. It states, "Special thanks to the U.S. National Archives." Do you see that?

A. Yes, I do.

Q. What was that special thanks for?

A. All the — Most of the footage that I had seen in this film came from the National Archives, so I thought they deserved credit.

Q. The footage that you're referring to is footage that appeared in Crusade in Europe?

A. That is correct.

Q. Am I correct that there — other than the wrap-around narration that was later added by using the radio personality Dale Reed, all the footage came from Crusade in Europe?

A. All the war footage, yes.

Q. What footage did not come from Crusade in Europe?

A. Well, certainly, the two-degree animation that we created did not come from Crusade in Europe, and the credits did not come from Crusade in Europe.

And the music and the radio shows that we used on those opening chapters did not come from Crusade in Europe.

[70] Q. Okay. So the opening title sequence and credits that you added did not come from Crusade in Europe?

A. That is correct.

Q. And the chapter heading sequences that you added did not come from Crusade in Europe?

A. That is correct.

Q. But everything else came from Crusade in Europe?

A. The —

MR. HYMAN: Objection. Argumentative and misstates the witness's testimony.

You can answer.

A. The war footage that I recognized came from Crusade in Europe.

BY MS. CENDALI:

Q. Well, what else was there that came from you other than the war footage?

A. Can you restate that? What else?

Q. Okay. You testified — The second-degree animation that you talked about, that was part of the opening credits? Correct?

A. Two — That is correct: Two-D [71] animation.

Q. Two-D animation. That was part of the opening credits?

A. That is correct.

Q. And that was supplied by you?

A. That's correct.

Q. And the chapter credits were — sequences were supplied by Dastar?

A. That is correct.

Q. And in connection with the chapter credits, there were some music and radio shows?

A. That is correct.

Q. And that was also supplied by Dastar. Correct?

A. Myself and L.A. Videograms.

Q. Okay. But everything else in the content of the videos was derived from Crusade in Europe. Correct?

A. That's correct.

Q. How long, approximately, is — Is Campaigns in Europe a seven-volume video set?

A. That is correct, yes.

Q. Approximately how many hours is the Campaigns in Europe set?

A. Campaigns in Europe is about seven . . .

* * *

[75] MR. HYMAN: Hold on a second. What information — Would you read the question back, please.

(The pending question was read.)

MR. HYMAN: Objection as to ambiguous as to "original source for the footage" as indefinite and ambiguous and also — also calls for — may call for speculation; lack of foundation as to what people would think when they saw it.

Go ahead, please.

A. Quite frankly, I don't — I've never seen the list before. I don't know what people would think if they don't see the list. I don't know.

BY MS. CENDALI:

Q. I'm not asking you about Plaintiffs' Exhibit 8 right now. What I'm asking is whether there is anything in Dastar's product Campaigns in Europe that contains any information that would tell viewers that the video set was derived from Crusade in Europe.

MR. HYMAN: Objection. Assumes facts not in evidence and calls for speculation [76] on the part of the witness.

You can answer.

A. I don't believe there's anything that contributes to that.

BY MS. CENDALI:

Q. Did Dastar make a conscious decision to not reference Crusade in Europe in creating Campaigns in Europe?

A. I can't speak for Dastar but — I'm not really sure where you want me to go with that.

Q. Well, just speaking for yourself, can you answer the question?

MR. HYMAN: Objection. Objection as to the question "just speaking for yourself, can you answer the question" as not a question. It — so I object to the question.

MS. CENDALI: Can you have the last two questions read back.

(The record was read.)

MS. CENDALI: And the next question? All right. I'll ask the question.

BY MS. CENDALI:

Q. Did you, in producing Campaigns in Europe, make a conscious decision to not [77] reference Crusade in Europe in producing the package?

A. No. The only conscious decision we made that I can recall was to make it a story of World War II rather than an Eisenhower story.

Q. And how did you do that?

A. By removing all the references to the book in question.

Q. When you say removing the references to the book in question, that's deleting the images of the book in the beginning and before the chapter titles. Correct?

A. That is correct.

Q. Did you do anything to remove content from the book from the narration for Crusade in Europe?

MR. HYMAN: Objections — no. Go ahead and answer. Withdraw the objection.

A. Not that I remember.

BY MS. CENDALI:

Q. Did you — In creating Campaigns in Europe, did you change any of the narration to the videotaped images?

A. The only thing we did —

MR. HYMAN: Just a second. You . . .

* * *

[80] A. The only thing we did, we removed narration. We didn't add any narration.

BY MS. CENDALI:

Q. When you removed narration, did you also remove the video images that accompanied that narration?

A. That is correct.

Q. But all the footage from Crusade in Europe that was included in Campaigns in Europe contains the original narration from Crusade in Europe?

A. That is correct.

Q. And am I also correct that all the footage from Crusade in Europe that was used in Campaigns in Europe uses the original music from Crusade in Europe?

A. I believe that is correct, too, except for the parts that we inserted.

Q. And the parts you inserted were the chapter sequences?

A. And the credits and title sequence.

Q. And the music that — Just to clarify: The music that you added was synchronized in connection with your — the chapter segments that you added and was not used

* * *

[82] Q. And you selected music of your own to accompany those images. Is that correct?

A. That is correct.

Q. Other than changing the recap — or one of the recaps that had appeared at the end of Crusade in Europe and moving it to the beginning of Campaigns in Europe, did you make any other changes to the sequence of the order of the footage in Crusade in Europe?

A. No.

Q. Did Dastar go to any news archives to obtain footage other than in connection with the chapter sequences?

A. Did Dastar?

Q. Or you yourself.

A. No, I didn't.

Q. I'd like to show you what has previously been marked as Plaintiffs' Exhibit 3, a video cassette box of six video tapes titled Dwight D. Eisenhower's Crusade in Europe and ask you, sir, if you've seen it before.

A. I've seen it with my lawyer. He showed it to me as part of evidence.

Q. I take it that was after this lawsuit was filed?

* * *

[114] . . . counsel as to why that sticker was added?

A. No.

Q. What does that language mean to you, if anything?

MR. HYMAN: Objection as to relevance.

Go ahead and answer.

A. I don't know. I never thought of it.

BY MS. CENDALI:

Q. Okay. After — am I correct that Campaigns in Europe was initially released by Dastar in or about October of '95?

A. I don't know when the release dates took place.

Q. Okay. I'll represent to you that that's what Mr. Andersen testified.

A. All right.

Q. What changes, if any, were made to the content of the video tapes themselves from the version of Campaigns in Europe that was originally released?

A. The subsequent revised masters you're referring to contained the wrap-around which we previously discussed.

[115] Q. So to date, am I correct that the only additional change from Campaigns in Europe, in the form it was originally released, was the inclusion of the wrap-around commentary by Dale Reed?

A. That is correct, except for our plans to redo it again.

Q. Let's turn first to Mr. Reed. I'd like to show you what's previously been marked as Plaintiffs' Exhibit 23.

MR. HYMAN: Just a second, please. Just give me one second, please.

MS. CENDALI: Sure.

MR. HYMAN: Okay. Go ahead.

THE WITNESS: I'm with you.

BY MS. CENDALI:

Q. Had you ever seen all or part of Plaintiffs' Exhibit 23 before?

A. I've certainly seen the content of it. The front letter I haven't.

Q. The front letter appears to be a letter from Jennifer Nolte to Dale Reed dated August 14th, '96. Is that right?

A. That is correct.

Q. With regard to the content, what do

[118] . . . of funny that the video producer is the one that's having the problem with the equipment.

THE VIDEOGRAPHER: Could I help with that?

THE WITNESS: That's okay. See, we on location use tape. Right here there would be a piece of tape, gaffer tape. Thank you.

MS. CENDALI: Would you mind reading back my last question. I lost my place.

(The pending question was read.)

BY MS. CENDALI:

Q. When you wrote the copy, Mr. Tarter, what message were you trying to convey to viewers?

A. I was trying to have the narrator say an overview of what the production was all about and kind of come across as an authoritative figure. And that's basically the message.

Q. Now, am I correct that the — Turn to page 1021, the first page after the cover letter in Exhibit 23.

A. Mm-hmm.

Q. There is a long paragraph that takes [119] up the entire page 1021 and ends at the top of page 1022. Do you see that?

A. Yes.

Q. Is that an introduction that Mr. Reed reads at the beginning of each volume of Campaigns in Europe?

A. That is correct.

Q. So each of the section volumes starts with him reading this same lengthy paragraph?

A. That is correct.

Q. And then am I correct that the subsequent paragraphs that appear on Exhibit 23 that each start with Volume 1, Volume 2, Volume 3, Volume 4, et cetera, is the narration — excuse me — is the introduction that Mr. Reed reads specifically with regard to individual volumes in Campaigns in Europe?

A. That is correct.

Q. So there isn't a single place at the beginning of Campaigns in Europe, for example, where the entire content of Mr. Reed's introduction would be read all in one place? Is that right?

A. Referring to the total script being [120] read at one time?

Q. Yes.

A. No. It's broken up into segments based on the volumes.

Q. And there's essentially a paragraph for each volume of the video cassette with a longer introductory paragraph that appears in each volume? Is that right?

MR. HYMAN: Objection: Asked and answered.

You can answer again.

A. Yes, that is correct.

BY MS. CENDALI:

Q. Thank you.

MR. HYMAN: Can we take a break in a couple minutes to make some calls?

MS. CENDALI: That's fine.

MR. HYMAN: So if you're . . .

MS. CENDALI: We'll break in a couple of minutes. Let's just go for a couple more minutes if we can.

MR. HYMAN: Are you finished with this line right now?

MS. CENDALI: If you'd like to take a break now, we can do so. Is that all

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[160] Q. What is his position at the company, if any?

A. He's editor and also a researcher.

Q. Does he work with you in developing video projects?

A. Yes, he does.

Q. When did Mr. Andersen prepare Plaintiffs' Exhibit 50?

A. I don't recall.

Q. Do you recall whether it was before or after the lawsuit was filed?

A. This was all basically set up when we talked about doing the new, revamped version of it with a new sound track and a new narration and new interviews. So this was pertinent to that.

Q. When was the first time that you discussed the idea of doing a new version of Campaigns in Europe?

A. I'd say about six months ago.

Q. And six months ago would have been after the lawsuit was filed. Is that right?

A. That is correct.

Q. Is the proposed revamped version in any way motivated in part by this lawsuit?

• • •

[164] You can answer again.

A. Yes.

BY MS. CENDALI:

Q. What is the source materials that you were using to create the new script?

A. The same before-mentioned library which we have.

Q. Are you also using the transcript reflected in Plaintiffs' Exhibit 50?

A. That would be a part of it, yes.

Q. Are you using General Eisenhower's book Crusade in Europe in any way to create the new script?

A. No.

Q. Are you attempting in any way to delete language from the narration of Campaigns in Europe that came from General Eisenhower's book?

A. That would certainly be a consideration.

Q. Are you aware that there are portions of General Eisenhower's book quoted verbatim in the narration of Crusade in Europe?

MR. HYMAN: Objection. Assuming facts not in evidence.

• • •

[167] I object to the question, because the question was all-inclusive, attorneys or anyone else. It didn't differentiate. It was also asked and answered.

BY MS. CENDALI:

Q. What stage of the revamp process is — Excuse me. When do you anticipate the revamp process will be completed?

A. We anticipate the product being finished in October.

Q. And as we sit here today, it is currently July 28th, 1999. Is that correct?

A. That is correct.

Q. And as we sit here today, there are currently no drafts of the script for the new project. Is that right?

MR. HYMAN: Objection: Asked and answered, and it's argumentative.

You can go ahead and you can answer again.

BY MS. CENDALI:

Q. You can answer the question.

MR. HYMAN: Again, it's not for her to tell you what to do —

MS. CENDALI: You just told him . . .

* * *

[176] . . . back in a few minutes.

MR. HYMAN: Okay. For the witness's sake.

(A recess was taken.)

THE VIDEOGRAPHER: We're on the record at 4:39.

BY MS. CENDALI:

Q. Mr. Tarter, let's — turning your attention back to Plaintiffs' Exhibit 4, the actual — an actual copy of the Campaigns in Europe video cassette, there's nothing on that packaging that gives credit to General Eisenhower, is there?

MR. HYMAN: Objection. Calls for speculation and calls for conclusion of this witness.

You can go ahead and answer.

A. Not that I know of.

BY MS. CENDALI:

Q. And there's nothing on the packaging of Campaigns in Europe that gives credit to Twentieth Century Fox, New Line, or SFM, is there?

MR. HYMAN: Objection. The document speaks for itself. Calls for a [177] conclusion.

Go ahead and testify.

A. Not that I am aware of.

BY MS. CENDALI:

Q. Am I correct that the only entities given credit on the packaging for Campaigns in Europe are Dastar and its dba, Marathon Video?

MR. HYMAN: Objection. The document speaks for itself.

And go ahead and answer.

A. You are correct.

MS. CENDALI: With the hope of minimizing additional fireworks from counsel, I'm going to tell you where I'm going.

I'm trying to see what knowledge this witness has as to certain of the claims in this case to find out whether or not he's going to be a witness as to these claims.

MR. HYMAN: There's not going to be any fireworks from counsel.

MS. CENDALI: Good.

MR. HYMAN: I don't know what you're talking about.

MS. CENDALI: Good.

MR. HYMAN: What fireworks?

* * * *

DEPOSITION OF NORMAN ANDERSEN
JULY 27, 1999

[Commencing at page 27]

. . . the paperwork, met with a couple of people at work that work with me, discussed the whole subject. And that is it.

BY MS. CENDALI:

Q. Who did you meet with at work?

A. Lanny Tarter.

Q. Who else?

A. Steve Hebert.

Q. Anyone else?

A. No. My wife.

Q. Does your wife have an active role in any of your companies?

A. Yes.

Q. What did you discuss in general with Mr. Tarter in preparation for your deposition?

A. Basically just the fact that we were going to do this; have you ever had a deposition before. I said I had, but in a real estate matter.

He said he had at some point. I don't know what the subject matter was. And basically we just talked about the mounds of paperwork. Almost joked about the lawyers shuffling papers.

Q. Did you discuss the issues in the . . .

* * *

[43] needed a different corporate name. So we moved the Starcorp company into Entertainment Distributing and then changed the name to Dastar. And we are two different divisions then.

Q. What is the relationship between Dastar and Marathon Music & Video?

A. Marathon Music & Video was another dba. And when we went into the business of video — producing our own video, we kind of resurrected that dba again — it was still on file at the State — to be used in that division of the company.

Q. So there was never a separate corporation called Marathon Music & Video, to your knowledge?

A. I don't believe so.

Q. So Marathon Music & Video is a current dba of Dastar. Is that right?

A. That is correct.

Q. When did Dastar get into the video business?

MR. HYMAN: Objection by what is meant — ambiguity as to get into the video business.

[44] Go ahead and answer.

A. Producing our own video, 1995.

BY MS. CENDALI:

Q. Had prior to that time Dastar sold videos produced by others?

A. Yes.

Q. How long had it been doing that?

A. Not long.

Q. Meaning a year or a couple years?

A. I don't really even recall. It was such a small part of the business.

Q. Okay. What was the first videos that Dastar produced?

A. Campaigns in Europe.

Q. Was that the first one?

A. Yes.

Q. Were there any other videos produced by Dastar in 1995?

A. I believe so, but I can't recall. The only one I can recall a specific title on in '95 was one called Apollo.

Q. Does Dastar still produce video today?

A. Sure.

Q. How many videos has Dastar released?

* * *

[66] BY MS. CENDALI:

Q. Does the company have any unsatisfied litigation judgments pending against it?

A. No. No. We sued somebody.

Q. Do you have any estimate as to what the company's profits have been in this most recent year?

MR. HYMAN: Objection as to what is meant by most recent year. Indefinite.

Go ahead and answer if you can.

A. Mr. Hebert will have to answer that.

BY MS. CENDALI:

Q. Do you recall what Dastar's profits were last year?

A. Same answer. I couldn't tell you specifically.

Q. Do you recall what Dastar's gross revenues were in the previously completed fiscal year?

A. Yes. Approximately 25 million.

Q. When did you learn that there was a documentary series called Crusade in Europe?

A. When I was 12 years old.

Q. How did you learn of it?

[67] A. I saw it on TV.

Q. And I take it you were aware that it was based on General Eisenhower's war memoirs, Crusade in Europe?

MR. HYMAN: Objection as to indefinite.

Do you mean when he saw it did he understand it at that time?

BY MS. CENDALI:

Q. You can answer the question.

A. Yes.

MR. HYMAN: Objection. Let me —

THE WITNESS: I thought you were done.

MR. HYMAN: Listen now. Objection as to indefinite as to do you mean that when — the question as to when — is the question as to did he understand it when he was 12 years old?

No. I don't want you to tell him he can answer the question. You are not here to tell him what he can or can't do.

MS. CENDALI: You're limited — you are not permitted to make that type of objection.

[68] BY MS. CENDALI:

Q. Did you — What did you mean by your answer, Mr. Andersen?

MR. HYMAN: No. Just let me finish. Let me finish.

Do you mean — is the question is — that is an improper question. I have made an objection.

Tell her, please, if you understood that it was Dwight D. Eisenhower, not when you first saw it when you were 12 years old.

THE WITNESS: Now I am confused.

MR. HYMAN: Well, did you understand it was Dwight D. Eisenhower —

THE WITNESS: When I was 12?

MR. HYMAN: Yes.

THE WITNESS: Yes.

MR. HYMAN: Okay. Go ahead.

Next question.

BY MS. CENDALI:

Q. Thank you. And I take it when you were a little older in life you still understood that it was based on Dwight D. Eisenhower's book?

[69] A. Yes.

Q. What led Dastar to consider releasing the sets of videos that it called Campaigns in Europe?

A. We were contemplating going into the video business and producing our own sets. And the opportunity to obtain what we believed was public domain material led us to decide to create a set called Campaigns in Europe.

Q. Who first got the idea to produce the video series called Campaigns in Europe?

A. Lanny Tarter.

Q. And did he take that idea to you?

A. Yes, he did.

Q. And what was your reaction?

A. I said, Find out, you know, all the information on it and let's look at it.

Q. When did this take place?

A. Approximately April of '95.

Q. What information did Mr. Tarter supply you?

A. He told me, based on his review of all the copyright information that he had available, and the source of original material, that it was public domain and could be edited [70] and marketed for the manner that we wanted to use it, which was a seven-video set.

Q. Is Mr. Tarter a lawyer?

A. No.

Q. Do you know whether the company consulted with counsel as to whether Crusade in Europe was in the public domain in 1995 before it released the video?

MR. HYMAN: Well, object. The question is — instruct the witness not to answer with regard to any —

Well, you can answer the question. Did the company consult with counsel?

A. No.

BY MS. CENDALI:

Q. Did the company, prior to releasing the video — I understand that the company Dastar released Campaigns in Europe in October of 1995. Is that correct?

A. That is correct.

Q. Prior to releasing Campaigns in Europe, did it seek an opinion from any lawyer as to whether such a release would infringe on anyone's rights?

A. No.

* * *

[72] BY MS. CENDALI:

Q. What consideration, if any, was given prior to October of 1995 as to whether General Eisenhower's book, Crusade in Europe, was in the public domain?

A. None.

Q. Why did you think Campaigns in Europe would be a good title for — Excuse me.

Why did you think Campaigns in Europe would be a good product for Dastar to release?

A. Significant interest in that period of the end of World War II — the 50th anniversary of the end of World War II. Therefore, we were looking to go into the video business and were looking for projects related to World War II.

Q. Am I correct that you thought that there might be good sales potential for World War II titles?

MR. HYMAN: Objection. Asked and answered.

But you can answer again.

A. Yes.

BY MS. CENDALI:

• • •

[132] . . . dialog, narration, or film footage showing the book.

Q. So you edited, then — just so I understand — all reference whatsoever to the fact that this was based on General Eisenhowser's book. Is that right?

MR. HYMAN: Well, objection as to misstates the witness's testimony.

You can answer.

A. Best of my knowledge.

BY MS. CENDALI:

Q. Was any of the narration of the Crusade in Europe documentary changed?

A. I can't answer that. I don't know.

Q. Are you aware of any instances of the narration being changed?

MR. HYMAN: Objection as to ambiguous as to narration being changed.

Go ahead and answer.

A. Well, I assume the narration was edited out in all these sequences that were edited out — the two hours and whatever number of minutes.

BY MS. CENDALI:

Q. Okay. Just so I am clear, what I am . . .

• • •

[144] . . . the video series from when it was originally released?

MR. HYMAN: Well, objection as to asked and answered.

Go ahead and answer.

A. I don't know.

BY MS. CENDALI:

Q. Does Dastar have any plans to make any additional changes to the content?

A. Yes.

Q. What are those plans?

A. We did a transcript of our entire set and —

MR. HYMAN: What are the plans and —

MS. CENDALI: Sir, would you please stop interrupting the witness. You are not to interrupt your witness in the midst of his answer. You have been doing it repeatedly. You have been accusing him of misanswering questions. You have been cutting him off.

You are not allowed to interrupt your witness in the midst of answering his questions. That is blatant coaching. The transcript will reflect that and we will bring [145] it before the magistrate.

BY MS. CENDALI:

Q. Mr. Andersen, would you please answer the question.

MR. HYMAN: Now, please read back the question.

MS. CENDALI: And the beginning of Mr. Andersen's answer before he was interrupted.

(The preceding question and answer was read back.)

BY MS. CENDALI:

Q. Could you answer, sir.

MR. HYMAN: Now, please, Mr. Andersen, the question is: What are the plans?

MS. CENDALI: Do you have an objection? Do you have an objection?

MR. HYMAN: Don't interrupt me.

MS. CENDALI: State your objection. State your objection.

MR. HYMAN: The question, Mr. Andersen, is —

MS. CENDALI: He understands the question. He was answering the question. If you have an objection, you may answer it. You [146] are not to start telling him what my question said because you want to rephrase it in a way you

like it. The witness is a smart man, and he was answering just fine on his own.

MR. HYMAN: Mr. Andersen, please answer the question what plans did you have, if any, to change the package.

A. We are planning to put an entire new sound track on this package, new narration, new music, and new sound effects.

BY MS. CENDALI:

Q. And who was involved in that project?

A. Several of my staff members.

Q. Including Mr. Tarter?

A. Probably has not been involved in it yet. Knows of it only.

Q. Has this work been completed?

A. No.

Q. Who made the decision to do this?

A. I did.

Q. Why?

MR. HYMAN: Objection to the extent that it calls for any attorney-client communications or discussions with counsel. I . . .

* * *

[157] Q. What information did he use in order to write this revised narration?

MR. HYMAN: Objection. Assumes he used information.

THE WITNESS: Right.

MR. HYMAN: Go ahead.

A. Basically you didn't need additional information.

MR. HYMAN: The question is: Do you know what information he used?

A. No, I don't know what he used.

BY MS. CENDALI:

Q. Do you know whether he used any historical information in order to revise this narration?

A. I have no idea.

Q. Do you know whether he attempted to compare the existing narration to the content of General Eisenhower's book Crusade in Europe?

A. I think he did.

Q. Do you understand that he then attempted to delete portions of the narration that came verbatim from General Eisenhower's book?

A. I don't know that.

* * *

[189] . . . Music & Video. Is that correct?

A. Right.

Q. What did you intend to convey to consumers by putting that legend there?

MR. HYMAN: Objection as to assumes this witness — may assume facts not in evidence.

Go ahead, please.

A. My first thought is that it is an attractive logo. Therefore, we were using — We had used it on all of our video packages.

BY MS. CENDALI:

Q. And what do you understand, if anything — Did you understand consumers to believe that Marathon Music & Video was the producer of this video?

MR. HYMAN: Objection as to lack of foundation. Calls for speculation.

Go ahead.

A. No.

BY MS. CENDALI:

Q. Is that a credit?

A. What do you mean by "credit"?

Q. Okay. Is it fair to say that the packaging of the Campaign in Europe gives credit [190] to Dastar Corporation and its dba's?

MR. HYMAN: Objection. Calls for a conclusion — and/or legal conclusion.

Go ahead and answer.

A. I would say yes.

BY MS. CENDALI:

Q. Is anyone — is any entity or person other than Dastar Corporation given any authorship credit on the packaging of Campaigns in Europe?

MR. HYMAN: Objection as to the use of the term "authorship credit." Assumes facts not in evidence.

Go ahead and answer.

A. No.

BY MS. CENDALI:

Q. Do Plaintiffs' names appear anywhere on the packaging?

A. No.

Q. Does General Eisenhower's name appear anywhere on the packaging?

A. Yes.

Q. Does it — How does it appear?

A. Well, without reading everything, I would say it probably appears on the back and [191] the one with Roosevelt, Churchill, de Gaulle, Hitler, Patton, Montgomery, and Rommel.

And on the front — or on the side, there is one title called Eisenhower's Thoughts, which would be on both ends and in the front left corner.

Q. Does anything on the packaging indicate that Campaigns in Europe was based on Eisenhower's book Crusade in Europe?

A. No.

MR. HYMAN: Objection. Calls for speculation.

A. No.

BY MS. CENDALI:

Q. So it is true, then, a consumer would have no way of knowing by looking at the packaging that Campaigns in Europe was based on General Eisenhower's book. Is that correct?

MR. HYMAN: Well, objection. Calls for speculation. Lack of foundation.

You can answer if you're able.

A. Well, this package was not based on Eisenhower's book.

BY MS. CENDALI:

Q. The Crusade in Europe documentary [192] series was based on General Eisenhower's book. Correct?

MR. HYMAN: Objection. Calls for a conclusion. Foundation. If you tell me — Crusade in Europe TV series or video or —

MS. CENDALI: We have already gone over this this morning. You should say asked and answered, I believe.

MR. HYMAN: Well, I am trying to avoid — I am trying to let you go ahead so we don't have a lot of squabbles.

MS. CENDALI: Right.

MR. HYMAN: So I am trying to do that without us spending time trying to — I don't want to squabble over every question, you know. Obviously, I could do that.

If you — But I don't want you to argue and so forth and so on. Go ahead and ask the question and we will take it from there.

A. What was it again?

BY MS. CENDALI:

Q. If in fact the Campaigns in Europe video set was based on General Eisenhower's book Crusade in Europe, there is nothing from the packaging that would communicate that to [193] consumers. Is that correct?

MR. HYMAN: Objection. Argumentative. And also objection, calls for speculation. And lack of foundation.

Go ahead and answer.

A. No, there is nothing on the package.

BY MS. CENDALI:

Q. And it is also true that from the packaging a consumer would have no way of knowing Twentieth Century Fox was involved in producing Campaigns in Europe. Is that correct?

MR. HYMAN: Objection. Assuming facts not in evidence and calls for conclusion and speculation and lack of foundation.

Go ahead and answer.

A. Twentieth Century Fox did not have anything to do with producing Campaigns in Europe.

BY MS. CENDALI:

Q. Twentieth Century Fox produced Crusade in Europe. Right?

MR. HYMAN: Objection. Foundation. If you know.

A. Yes, that is true.

BY MS. CENDALI:

[194] Q. How many hours of the documentary series Crusade in Europe is contained in Campaigns in Europe?

A. I think Campaigns in Europe is approximately seven hours.

Q. And so seven hours of footage in Campaigns in Europe was taken from Crusade in Europe. Correct?

MR. HYMAN: Objection. Foundation. If you know.

A. That is correct.

BY MS. CENDALI:

Q. And none of the — And a consumer would have no way of knowing that any of the other plaintiffs had any other — had any involvement with Campaigns in Europe, too. Isn't that right?

MR. HYMAN: Objection. Calls for speculation. Lack of foundation. Assumes facts not in evidence.

Go ahead and answer if you are able.

A. I have no idea.

BY MS. CENDALI:

Q. There is nothing mentioning them on [195] the packaging. Right?

MR. HYMAN: Objection.

A. I am not sure who you are referring to.

BY MS. CENDALI:

Q. Well —

A. Besides Twentieth Century Fox.

Q. SFM Entertainment LLC, and New Line Home Video, they're not mentioned on the packaging either, are they?

A. No.

(A discussion was had off the record.)

BY MS. CENDALI:

Q. Now, in producing — Well, actually, let me do this. Could you quickly make a —

(A recess was taken.)

BY MS. CENDALI:

Q. Okay. Now, turning to the content of the video — videos Campaign in Europe itself, am I correct that one of the things Dastar did was delete the credits from Crusade in Europe in producing Campaigns in Europe?

A. Yes, that is correct.

Q. Okay. And when Dastar did its . . .

* * *

[198] Q. I note that according to at least Plaintiffs' Exhibit 6 there is a reference of special thanks to the U.S. National Archives. Do you know what that thanks is in relation to?

A. Not directly, no.

Q. Indirectly do you have any information as to what that might be in relation to?

A. I assume it is in relationship to either photographs or footage included in this package.

Q. Who created the credits for — as they were used in Campaigns in Europe?

A. I have no idea.

Q. Did Lanny Lee develop the credits for use in Campaigns in Europe?

A. I don't know.

Q. There is no reference in any of the credits for Campaigns in Europe to General Eisenhower or his book. Correct?

A. Correct.

MR. HYMAN: Are you talking about this list, Exhibit No. 6?

BY MS. CENDALI:

Q. To your knowledge — Leaving aside [199] even Plaintiffs' Exhibit 6, to your knowledge there is no credit in Campaigns in Europe to General Eisenhower or his book. Correct?

A. Correct.

MS. CENDALI: I would like to mark —

(A discussion was had off the record.)

MR. HYMAN: Are you going to make some more copies of stuff?

MS. FRANCIS: It isn't easy being in a hotel.

MS. CENDALI: Let's proceed with some other questions while she does that.

MR. HYMAN: That is great.

BY MS. CENDALI:

Q. I would like to show you what we will mark as Plaintiffs' Exhibit 7, what I will represent to you are the credits done via a video grab from Plaintiffs' Crusade in Europe video set.

(Deposition Exhibit No. 7 marked for identification.)

(A discussion was had off the record.)

* * *

[298] . . . on Exhibit 5" or "master recordings generically." Objection as to ambiguous.

Please answer.

BY MS. CENDALI:

Q. Can you continue your answer, Mr. Andersen?

MR. HYMAN: Please do not address the witness like that. He will — I have asked him to answer the question. That is not your job to tell him.

MS. CENDALI: Due to your coaching, the witness is now sitting here confused and unable to continue with the answer that he already began.

MR. HYMAN: No. Listen, that's — You don't have any basis for that. The question is — You've asked the question. I made my objection. You're not to direct this witness what to do.

Please answer, Mr. Andersen.

A. A master recording would be a high-quality film — 30-frame per second that can be used for running masters for manufacturing and editing purposes.

BY MS. CENDALI:

[299] Q. And you purchased such master recordings of Crusade in Europe. Is that correct?

A. That is correct.

Q. And you used those master recordings to make Campaigns in Europe. Right?

A. That is correct.

Q. And, again, just so that I am clear, what you purchased for this $6,292 was an edited version of the Crusade in Europe documentary series. Is that correct?

A. Film series?

Q. Yes.

A. That is correct.

Q. And who, if anyone, gave Method Song Writing instructions as to what to delete?

A. Lanny Lee would have done that.

Q. Okay.

(A recess was taken.)

MS. CENDALI: I would like to mark as Plaintiffs' Exhibit 14 a series of documents bearing Bates Nos. 1057 through 1063 that appear to be invoices from LA Videograms billed to Dastar Corporation on various dates in 1995.

* * *

[375] MS. CENDALI: I have a new document that is not an invoice and I would like to talk about this new document which is on a different subject with this witness.

MR. HYMAN: We are here to continue provided that the witness is not being harassed by being asked repeatedly what numbers are on the pages. Go ahead.

MS. CENDALI: I would like to mark as Plaintiffs' Exhibit 32 a document dated July 15, 1997, to the legal affairs department of Marathon Music & Video from New Line Home Video, SFM Entertainment, and Twentieth Century Fox Film Corporation.

(Deposition Exhibit No. 32 marked for identification.)

BY MS. CENDALI:

Q. Do you recognize that document, Mr. Andersen?

A. Yes, I do.

Q. What is it?

A. It is letter from all these people. It says, re Campaigns in Europe and Campaigns in the Pacific.

MR. HYMAN: The question was: Do [376] you know what it is?

A. I recognize it.

MR. HYMAN: Thank you.

BY MS. CENDALI:

Q. Did you receive this document on or about July 15, 1997?

A. Some point after that.

Q. Does the document put you on notice that the authors of the document object to the distribution of Campaigns in Europe?

MR. HYMAN: Objection. Calls for legal conclusion as to whether it puts him on notice. And the document, of course, its contents speaks for itself.

You can answer, if you're able, the document puts you on notice.

A. So you're asking me what my understanding of this document is?

BY MS. CENDALI:

Q. Yes, sir.

A. All these big, huge companies decided that I didn't have the rights to put out these two packages, therefore, they are telling me I shouldn't be doing that.

Q. And prior to receiving this letter, . . .

* * *

[379] BY MS. CENDALI:

Q. Mr. Andersen —

MR. HYMAN: I wanted to finish saying that we are not going to go into the evening — it is 6:10, 6:15 — for you to repeat questions and to have you repeat questions that you have already asked.

We are not going to go into the evening for you to ask people as to what documents say. If you can't do better than that, we will come back tomorrow morning. That is all I can tell you. We are not going to do it.

So understand that we don't — we want to finish tonight, but if you can't — if you keep asking the same questions over again, we are not going to stay here for this.

BY MS. CENDALI:

Q. Mr. Andersen, the first demand made in the letter dated July 15, 1997, Plaintiffs' Exhibit 32, requests that Marathon immediately cease and desist from distributing and offering the pictures for sale or license and stop all advertising of the pictures. Do you see that?

A. Yes.

[380] Q. Did Dastar do that?

A. No.

Q. The second demand states, Marathon immediately surrender to New Line all copies of the pictures and any promotional materials relating thereto in its possession or control and identify and account to New Line, Fox, and SFM for all sales or licenses of picture. Do you see that?

A. Yes.

Q. Did Marathon do that?

A. No.

Q. The third demand states, Marathon inform us in detail of both the means by which Marathon obtained —

THE REPORTER: Excuse me, ma'am. Would you please slow down.

BY MS. CENDALI:

Q. The third demand states, Marathon inform us in detail of both the means by which Marathon obtained copies of the pictures and the names and addresses of the parties who provided you with those copies. Do you see that?

A. Yes.

Q. Did Marathon do that?

[381] A. No.

MR. HYMAN: You know, I don't think any of that is in dispute. And to spend your time reading letters to someone when it is not in dispute — Go ahead, please.

BY MS. CENDALI:

Q. What, if anything, did Dastar do in response to Plaintiffs' Exhibit 32?

MR. HYMAN: Objection. I advise the witness not to disclose anything it did pertaining to communications it had with its counsel.

Anything else, you can go ahead and so state.

A. On our own, I believe we contacted the Library of Congress and obtained whatever information we could on the copyrights on Crusade in Europe and Crusade in the Pacific.

BY MS. CENDALI:

Q. Did Dastar consult an attorney — I am only asking yes or no — in connection with the Plaintiffs' Exhibit 32?

MR. HYMAN: Well, objection as to time frame.

BY MS. CENDALI:

[382] Q. At or around the time that it was sent in July of 1997?

A. No.

Q. When was the first time Dastar consulted an attorney with regard to the claims of copyright infringement made by Plaintiffs in this action?

MR. HYMAN: Objection as to it's indefinite as to the claims of copyright infringement by Plaintiffs in this action. It is indefinite.

And it appears to me — Well, go ahead, if you're able — It is indefinite and the question is ambiguous and indefinite.

If you're able to answer, go ahead.

A. We did not contact legal counsel until after these companies filed a suit against us.

MS. CENDALI: Okay. I would like to mark as Plaintiffs' Exhibit 33 a letter on EDI Entertainment Distributing stationery to New Line Home Video, Twentieth Century Fox Film Corporation, and SFM Entertainment dated July 29th, 1997.

* * *

[389] . . . letter we sent.

Q. It is from New Line Cinema to Mr. Hebert?

A. Yes, it is. Oh, I do remember this.

Q. Under the second paragraph of the letter it states, we are in the process of compiling copies of all of the appropriate documentation to evidence the appropriate copyright ownership and legitimate distribution rights in the programs and will provide the same to you as soon as possible. Do you see that?

A. Yes.

Q. It then states, In the meanwhile, I will reiterate my request that you provide me with information concerning where you obtained the materials to make your video dubs.

Did you provide New Line with such information?

A. Absolutely not.

MR. HYMAN: Say yes or no. Did you?

THE WITNESS: No.

MR. HYMAN: Thank you.

BY MS. CENDALI:

Q. Did Dastar take any action as a . . .

* * *

[402] . . . to get a better one.

Is this a letter from Eric Kulberg to Lanny Lee to the best of your knowledge dated September 22nd, '98? Is that what it is?

THE WITNESS: Yes.

MR. HYMAN: Thank you very much.

Please proceed.

MS. CENDALI: Counsel, you have interrupted my witness. You have cut off his line of questioning.

Once again in our motion for sanctions — I am putting you on notice that we are moving for sanctions as well as to compel answers to these questions.

We will have his deposition in Los Angeles and we are seeking attorneys fees and costs. And I am putting you on notice again that I will seek personal sanctions against you personally.

MR. HYMAN: Me personally?

BY MS. CENDALI:

Q. Mr. Andersen, was some precipitating event that led Dastar to consult with Universal Media, Inc., with regard to copyright issues —

[403] MR. HYMAN: Objection.

BY MS. CENDALI:

Q. — in or around September of 1998?

MR. HYMAN: Objection. Assumes facts not in evidence, consulted at that time. Also to some extent asked and answered.

Go ahead, please.

A. I don't remember the date of the filing of the lawsuit, but I believe it was around this period — this time. Therefore, we asked again one of our researchers to do some work on the copyrights information on the Crusade in Europe films and book.

BY MS. CENDALI:

Q. And in the second paragraph of this document on the first page, it states in the last sentence, It appears that Doubleday & Company has a solid copyright on this work and will hold it at least until 2023. Do you see that?

A. Yes, I do.

Q. Did you take any action after reading that statement from your copyright researcher?

MR. HYMAN: I would go ahead and [404] object that that question is indefinite as to taking any action.

And I would ask the witness please to not relate anything that was resulted from — related to any discussions you have had with counsel.

Other than that, please testify.

A. After we got this information, I believe that at that time we had retained counsel. And therefore, as Mr. Hyman said, all other discussions related to this were with his firm.

BY MS. CENDALI:

Q. You continued to sell Campaigns in Europe after receiving this September 22nd, 1998 letter from Universal Media, Inc. Is that right?

A. That is correct.

Q. The letter on the second page states in the last paragraph, Please find attached documentation including the raw research performed by our copyright researcher, Oleg Semkoff. Do you see that?

A. Yes.

MS. CENDALI: I call for . . .

* * * *

DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 98-7189 DT (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, etc., et. al.,

Plaintiffs,

v.

DASTAR CORPORATION, etc., et al.,

Defendants.

AND RELATED COUNTER-CLAIMS.

DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

Date: December 13, 1999

Time: 10:00 a.m.

Place: Before the Honorable Dickran Tevrizian, United States District Court Judge

Defendants respond to Plaintiffs one hundred and twenty one (121) "Statements of Uncontroverted Facts," as follows:

1. Undisputed. (The Court could most likely take judicial notice of this fact, which Defendants would not

object. Technically the Dec. of John Eisenhower does not provide sufficient foundation to support the assertion of this fact which is not in dispute.)

2. Undisputed. (Again the Court could probably take judicial notice of this fact, in that again that the Dec. of John Eisenhower is without foundation to support this conclusion.)

3. Disputed. (Lack of foundation by Power Declaration. Power has no personal knowledge to authenticate the document (Ex. A to Power Declaration), and the document itself is hearsay, and was not disclosed under Local Rule 6.2.2, is inadmissible pursuant to FRCP Rule 37(a)(1), in that it was not disclosed.)

4. Not disputed as to the fact asserted that "for years General Eisenhower: . . . refused offers to write his memoirs. . . ." Disputed as to the remainder of Proposed Finding No. 4, in that it is based upon not authenticated hearsay statements allegedly inferred from a partial selection of documents not disclosed under Local Rule 6.2.2 and FRCP Rule 37(a)(1).

5. Disputed. (Based upon lack of foundation and hearsay Declarations of Eisenhower and Vaughan.)

6. Disputed. (Based upon hearsay statements inferred from documents partially obtained after discovery cut-off date by the Plaintiffs who had apparent knowledge of those documents prior to discovery cut-off date, and who did not disclose those documents as required by Local Rule 6.2.2, and FRCP Rule 37(a)(1).)

7. Disputed. (Based upon Declarations as to hearsay of what "Black and Robinson" stated to General Eisenhower, by those without foundation to make such statements, and based also upon hearsay statements in documents, selectively obtained after discovery cut-off by Plaintiffs, and not disclosed as required by Local Rule 6.2.2 and FRCP Rule 37(a)(1).)

8. Disputed. (Based upon Declarations as to hearsay of what "Black and Robinson" stated to General Eisenhower, by those without foundation to make such statements, and based also upon hearsay statements in documents, selectively obtained after discovery cut-off by Plaintiffs, and not disclosed as required by Local Rule 6.2.2 and FRCP Rule 37(a)(1).)

9. Disputed. (Based upon Declarations as to hearsay, and presents a conclusion without foundation as to General Eisenhower' "state of mind," which is presented by John Eisenhower without foundation.)

10. Disputed. (Based upon hearsay and lack of foundation and conclusionary statement by John Eisenhower.)

11. Disputed. (This fact is based upon the hearsay contents of an not-authenticated document, one (1) of twenty-six (26) selectively chosen out of approximately over 1,000 pages of documents from the "McCormick Collection," which neither the particular document itself, nor the "McCormick Collection" was disclosed by Plaintiffs as required under Local Rule 6.2.2 and FRCP Rule 37 (a)(1).)

12. Disputed. (Based upon lack of foundation, conclusionary statements, and hearsay contained in documents apparently selectively obtained by Plaintiffs after discovery cutoff, which was not disclosed to Defendants as required by Local Rule 6.2.2 and FRCP Rule 37 (a)(1).)

13. Disputed. (This fact is based upon the hearsay contents of an not-authenticated document, one (1) of twenty-six (26) selectively chosen out of approximately over 1,000 pages of documents from the "McCormick Collection," which neither the particular document itself, nor the "McCormick Collection" was disclosed by Plaintiffs as required under Local Rule 6.2.2 and FRCP Rule 37 (a)(1).)

14. Disputed. (Based upon hearsay found in documents selectively obtained by Plaintiffs from the "Eisenhower Library," apparently after the discovery cut-off date, not disclosed to Defendants as required by Local Rule 6.2.2 and FRCP Rule 37(a)(1).)

15. Disputed. (This fact is based upon the hearsay contents of an not-authenticated document, one (1) of twenty-six (26) selectively chosen out of approximately over 1,000 pages of documents from the "McCormick Collection," which neither the particular document itself, nor the "McCormick Collection" was disclosed by Plaintiffs as required under Local Rule 6.2.2 and FRCP Rule 37(a)(1). Based upon hearsay found in documents selectively obtained by Plaintiffs from the "Eisenhower Library," apparently after the discovery cut-off date, not disclosed to Defendants as required by Local Rule 6.2.2 and FRCP Rule 37(a)(1).)

16. Disputed and not relevant. (Based upon hearsay found in documents selectively obtained by Plaintiffs from the "Eisenhower Library," apparently after the discovery cut-off date, not disclosed to Defendants as required by Local Rule 6.2.2 and FRCP Rule 37 (a)(1).)

17. Disputed and not relevant. (Based upon hearsay found in documents selectively obtained by Plaintiffs from the "Eisenhower Library," apparently after the discovery cut-off date, not disclosed to Defendants as required by Local Rule 6.2.2 and FRCP Rule 37 (a)(1).)

18. Disputed and not relevant. (Based upon hearsay found in documents selectively obtained by Plaintiffs from the "Eisenhower Library," apparently after the discovery cut-off date, not disclosed to Defendants as required by Local Rule 6.2.2 and FRCP Rule 37(a)(1).)

19. Disputed and not relevant. (Based upon hearsay found in documents selectively obtained by Plaintiffs from the "Eisenhower Library," apparently after the discovery

cut-off date, not disclosed to Defendants as required by Local Rule 6.2.2 and FRCP Rule 37 (a)(1).)

20. Disputed. (Lack of foundation, speculative and conclusionary as to statements by Mr. Vaughan.)

21. Disputed. (Lack of foundation as to Eisenhower Dec., Vaughan Dec. and Jahss Dec. The Jahss Dec., Ex. L, is not authenticated and is presented for the purposes of the hearsay statements in a document selectively obtained from the "Eisenhower Library," most probably after the discovery cut-off date, not disclosed as required by Local Rule 6.2.2. The statements in the Vaughan Dec. lack foundation, and the John Eisenhower Dec. lacks foundation as to the financial events of 1948 and thereafter. A question of fact is presented as to whether there was an "ongoing royalty obligation," from Doubleday and Company ("DOUBLEDAY") and its successors, given the 1986 letters from DOUBLEDAY to John Eisenhower and from John Eisenhower to DOUBLEDAY, indicating that John Eisenhower had control over the granting of the license from DOUBLEDAY to Twentieth Century Fox Film Corp. ("20TH") as of 1986, and was to benefit financially from the terms of the Doubleday to Fox license.)

22. Disputed and not relevant. (The Vaughan Dec. is based upon hearsay, is conclusionary and is without foundation, in that Vaughan did not become employed by DOUBLEDAY until 1954. This fact, to the extent it is relevant, is disputed by other documents from the "McCormick Collection," which indicates advanced sales of the book to be extensive.)

23. Disputed. (Mr. Vaughan, by his own admission and testimony, did not become employed by DOUBLEDAY until 1952 [OR 1954]. Mr. Vaughan does not have sufficient foundation under Fed. Rules of Evidence Rule 603 to support the statement made which can only be based upon hearsay, and is objectionable, in that it is conclusionary.)

24. Disputed. (The statement of John Eisenhower is a legal conclusion as to the financial rights of the heirs of General Eisenhower. It would appear contrary to John Eisenhower's legal conclusion that the "heirs of General Eisenhower" may have extensive claims and a financial interest as to DOUBLEDAY's act of misappropriation of the Renewal Copyright rightfully belonging to the Eisenhower's heirs. John Eisenhower's conclusionary statement is also disputed by the exchange of letters between DOUBLEDAY and John Eisenhower of 1986 (Dec. of Allen Hyman as to additional documents), in which it appeared that John Eisenhower had control and authority over the licensing of the book during the renewal period, and was to benefit financially from that licensing in 1986.)

25. Disputed and irrelevant. (Ex. C to the Vaughan Dec. was not disclosed by Plaintiffs as required by Local Rule 6.2.2, and the action taken with regard to another book is irrelevant. Yet, if any inference is to be drawn, it supports that of the Defendants, in that most likely "The White House Years" was undertaken at the solicitation and urging and courting of DOUBLEDAY, and therefore was "at the instance of DOUBLEDAY," according to Plaintiffs' own legal theory.)

26. Disputed and irrelevant. (The Vaughan and John Eisenhower Declarations are without foundation as to the writings of General Eisenhower prior to 1948. John Eisenhower's conclusionary statement could only be based upon hearsay. It is speculative for John Eisenhower and Mr. Vaughan to speculate on the length and effort of General Eisenhower's former writings. The conclusionary statements is that General Eisenhower had: "no previous experience writing a Book." General Eisenhower may have written U.S. Army manuals during his career, which were in the form of a "book," and may have written extensive "battle plans,' in the form of a book.)

27. Dispute. (This proposed finding is based upon conclusionary statements by Mr. Vaughan not employed with DOUBLEDAY at the time, and is based upon the lack of foundation of the statements of John Eisenhower. There is no competent evidence with sufficient foundation to support the conclusionary statement as to what was General Eisenhower's state of mind of "what he welcomed. . . ." As well, the DOUBLEDAY 1976 Introduction to the book sets forth a statement of facts which is an admission of DOUBLEDAY, contrary to an assertion of "DOUBLEDAY's supervision." Disputed by the statements of Manfred Jonas in the 1976 Introduction and by General Eisenhower's Acknowledgements. (Notice of Lodging of Book, Tabs 1 and 2.))

28. Disputed. (There is no foundation for the statement by any of the declarants (John Eisenhower states he "believes or understands," and the Jahss Dec. and Power Dec. present hearsay information from not-authenticated documents not disclosed as required by Local Rule 6.2.2 and FRCP rule 37(a)(1).)

29. Disputed. (The Dec. of Vaughan as to these statements is conclusionary, and without foundation. Disputed by the Manfred Jonas Introduction and the General Eisenhower Acknowledgement found in the Book (Notice of Lodging of Book, Tabs 1 and 2 .))

30. Disputed. (The statements by John Eisenhower, Vaughan, Jahss and Power are without foundation, conclusionary, are based on hearsay found in selected documents obtained after discovery cut-off within the knowledge of the Plaintiffs not disclosed pursuant to Local Rule 6.2.2. and FRCP rule 37(a)(1). The statements are directly contradicted by the statements presented in the "Manfred Jonas 1976 Introduction," and the "General Eisenhower Acknowledgments." (Notice of Lodging of Book, Tabs 1, 2 and 3.))

31. Disputed. (Mr. Vaughan has no foundation to make the conclusionary statement. The statement of Vaughan is directly contradicted by the extensive facts recited in the Manfred Jonas 1976 Introduction and the General Eisenhower "Acknowledgments." Notice of Lodging of Book, Tabs 1 and 2.))

32. Disputed. (Mr. Vaughan has no foundation to make the conclusionary statement. The statement of Vaughan is directly contradicted by the extensive facts recited in the Manfred Jonas 1976 Introduction and the General Eisenhower "Acknowledgments." Notice of Lodging of Book, Tabs 1 and 2.))

33. Disputed. (Mr. Vaughan has no foundation to make the conclusionary statement. The statement of Vaughan is directly contradicted by the extensive facts recited in the Manfred Jonas 1976 Introduction and the General Eisenhower "Acknowledgments." Notice of Lodging of Book, Tabs 1 and 2.))

34. Disputed. (No foundation as to hearsay statements of selectively obtained documents of Plaintiffs counsel after the discovery cut-off date, not disclosed as required pursuant to Local Rule 6.2.2. Explicitly contradicted by the Manfred Jonas Introduction of 1976 and the General Eisenhower Acknowledgments. (Notice of Lodging of Book, Tabs 1 and 2.))

35. Disputed, and irrelevant. (No foundation as to hearsay statement attached to Power Declaration, not disclosed as required by Local Rule 6.2.2, and directly contradicted by the Manfred Jonas 1975 Introduction and General Acknowledgments. (Notice of Lodging of Book, Tabs 1 and 2.))

36. Disputed, irrelevant, nonsensical. (No foundation of Vaughan who became employed in 1954, directly contradicted by the 1975 Jonas Introduction that the "fact checking"

was undertaken at General Eisenhower's direction by U.S. Army war historians, and this statement is directly contradicted by the Jonas Introduction and General Eisenhower Acknowledgments (Tabs 1 and 2 to Notice of Lodging).)

37. Disputed and irrelevant. (No foundation, based upon undisclosed statements without foundation, and based upon hearsay in documents not revealed as required by Local Rule 6.2.2.)

38. Disputed. (No foundation as to the Declarations provided as to the personal knowledge of the declarants, based upon hearsay in undisclosed documentation not disclosed pursuant to Local Rule 6.2.2.)

39. Not disputed.

40. Disputed, and irrelevant. (No foundation as to General Eisenhower's state of mind by any of the declarants, conclusionary and irrelevant as to critical and commercial success.)

41. Disputed in part, in that the statement contains an implicit conclusion and is incomplete. (DOUBLEDAY apparently completed and filed the initial applications for copyright, identifying itself as the copyright claimant and Dwight D. Eisenhower as the sole and only author. DOUBLEDAY did not timely renew anything. This is a legal conclusion. DOUBLEDAY purported to attempt to renew the initial copyrights unlawfully and illegally in DOUBLEDAY's name as the improper claimant.)

42. Disputed and irrelevant. (John Eisenhower has no foundation to make the legal and conclusionary statements as to General Eisenhower's work was "undertaken by commission and sold outright to DOUBLEDAY." If that statement is true, that Proposed Fact No. 43 is totally

inconsistent with a work for hire. A work for hire belongs to the Employer from the onset, this statement contends that the work was commissioned and sold outright after completion, which would result in the renewal rights belonging to the Eisenhower Estate under the fact of the commissioning party's registration of the work as Dwight D. Eisenhower as the Author. This fact is also disputed as irrelevant, and by the existence of the two (2) 1986 letters from DOUBLEDAY to John Eisenhower and return, in which John Eisenhower appears to have control and benefit financially from the exploitation of the *Crusade in Europe*, during the renewal period.)

43. Disputed, irrelevant. (Lack of foundation as to the state of mind of the other Eisenhower heirs as of 1975, inconsistent with the 1986 letters from DOUBLEDAY to John Eisenhower and return, in which John Eisenhower is acknowledged to have a control and financial interest in the book as of 1986.)

44. Disputed, irrelevant, conclusionary, lack of foundation.

45. Disputed. (States a legal conclusion. DOUBLEDAY granted to 20TH the purported television rights in the Book.)

46. Disputed. (The Declarations offered to support these statements are totally without foundation, totally hearsay. Reed, Levathes and Feinstein were not identified as witnesses under Local Rule 6.2.2.)

47. Disputed (Total hearsay as to Feinstein's Declaration as to what Levathes stated, and no foundation, not listed as witness under Local Rule 6.2.2.)

48. Disputed. (Total hearsay as to Feinstein's Declaration as to what Levathes stated, and no foundation, not listed as witness under Local Rule 6.2.2.)

49. Disputed and irrelevant. (Neither the witness nor the document was disclosed under local Rule 6.2.2, and states a legal conclusion.)

50. Disputed and irrelevant. (Neither the witness nor the document was disclosed under local Rule 6.2.2, and states a legal conclusion.)

51. Disputed and irrelevant. (Total hearsay as to Feinstein's Declaration as to what Levathes stated, and no foundation, not listed as witness under Local Rule 6.2.2.)

52. Disputed and irrelevant. (Total hearsay as to Feinstein's Declaration as to what Levathes stated, and no foundation, not listed as witness under Local-Rule 6.2.2.)

53. Disputed and irrelevant. (Total hearsay as to Feinstein's Declaration as to what Levathes stated, and no foundation, not listed as witness under Local Rule 6.2.2.)

54. Disputed and irrelevant. (Total hearsay as to Feinstein's Declaration as to what Levathes stated, and no foundation, not listed as witness under Local Rule 6.2.2.)

55. Disputed and irrelevant. (Total hearsay as to Feinstein's Declaration as to what Levathes stated, and no foundation, not listed as witness under Local Rule 6.2.2.)

56. Disputed and irrelevant. (Total hearsay as to Feinstein's Declaration as to what Levathes stated, and no foundation, not listed as witness under Local Rule 6.2.2.).

57. Disputed and irrelevant. (Total hearsay as to Feinstein's Declaration as to what Levathes stated, and no foundation, not listed as witness under Local Rule 6.2.2.)

58. Disputed. (Assumes a legal conclusion that 20TH acquired any rights. 20TH purported to obtain TV rights to the book.)

59. Disputed. (Assumes a legal conclusion that Fox acquired rights to anything. Fox acquired the purported rights from DOUBLEDAY who possessed no rights to license.)

60. Not disputed as to facts stated disputed to the extent it implies a legal conclusion. (Fox purported to obtain rights from DOUBLEDAY which were recorded.)

61. Not disputed, except to the extent it implies a legal conclusion that Fox had rights to grant to SFM. (20TH purported to grant rights to SFM.)

62. Not disputed, except to the extent it implies a legal conclusion. (SFM purported to grant rights to SFM and NEW LINE.)

63. Disputed and irrelevant. (Disputed on the basis that the testimony is hearsay and that there is no foundation.)

64. Disputed and irrelevant. (The statement is based upon hearsay and is conclusionary.)

65. Disputed and irrelevant. (Hearsay as to Moger Declaration, no foundation by Moger himself personally.)

66. Disputed, irrelevant. (No foundation as to Moger himself, and conclusionary.)

67. Disputed and irrelevant. (No foundation as to Moger's having personal knowledge, and appears based upon hearsay.)

68. Disputed and irrelevant. (No foundation as to Moger's having personal knowledge, and appears based upon hearsay.)

69. Disputed and irrelevant. (No foundation as to Moger's having personal knowledge, and appears based upon hearsay.)

70. Disputed and irrelevant. (No foundation as to Moger's having personal knowledge, and appears based upon hearsay.)

71. Not disputed though irrelevant.

72. Not disputed.

73. Disputed. (The actual creators were Time, Inc., which created the twenty-sic (26) reels in late 1940's and the early 1950's (initial copyright registrations of the twenty-six (26) reels).)

74. Not disputed.

75. Not disputed.

76. Disputed to the extent the statement implies a legal conclusion, New Line, the purported successor in interest to rights.

77. Disputed. (Witness Anderson was not identified in the initial disclosure of witnesses or the supplemental disclosure under Local Rule 6.2.2 (pages 18 and 23 to DEFENDANTS' Objection and Request to Strike.)

78. Disputed. (Mischaracterizes the testimony. In 1995, Lanny Tarter was at that time a free-lance video producer in Hollywood with no association or affiliation with the DEFENDANTS and with no association or affiliation with Norman Andersen. (Depositions and Declarations of Tarter and Andersen.))

79. Not in dispute.

80. Disputed. (Tarter suggested to Andersen that a video series concerning WW II would sell well. Deposition of Tarter and Andersen and Declaration of Tarter and Andersen.)

81. Not disputed.

82. Disputed, irrelevant. (Tarter is presently in charge of video acquisitions, but was an independent producer with no affiliation with DEFENDANTS at the time of production of the videos "Crusade in Europe." (Deposition and Declaration of Tarter and Andersen.))

83. Not in dispute.

84. Disputed. (Tarter also added music, an introduction and commentary, and other modifications, and edited out all references to the Eisenhower book. (Deposition of Tarter and Andersen.))

85. Disputed. (Tarter included an introduction and additional music. (Deposition of Tarter and Andersen.))

86. Disputed, as based upon Tarter's Deposition. (Some of the "Campaign in Europe" contains some of the original narration from Crusade in Europe. Tarter has no personal knowledge of the book.)

87. Disputed. (There is also added introduction and other editing changes, including editing out the General Eisenhower references to the book and language of General Eisenhower. Plaintiffs did not reference the complete excerpts of the deposition which cover this issue as to Mr. Andersen's statements.)

88. Admitted.

89. Disputed. (Reed was not identified as a witness under Local Rule 6.2.2, and REED utilized a version of the book not provided in discovery to Defendants. Defendants examination show approximately 400 references found in the Eisenhower book found in the seven hours of video that is approximately 4% of the total narration in the video series is expression found in the Eisenhower book.)

90. Disputed. (Some of the text of Campaigns in Europe which utilize the Eisenhower Expression contain Eisenhower's expression of only historical facts, REED is without foundation to make the statement set forth in REED's declaration as to what is historical unprotected fact and what is Eisenhower's thoughts and expressions.) DEFENDANTS estimate a considerable percentage of the approximately 400 elements of expression found in Eisenhower Book are historical fats.)

91. Disputed. (Reed was not listed nor identified as an expert, nor listed on witness list under 6.2.2 for any purpose, and Reed is without basis to make the statement, and it is precluded, in that there was no disclosure of Reed under Local Rule 6.2.2.)

92. Disputed. (Reed was not disclosed as a witness under Local Rule 6.2.2, and was not disclosed as an Expert to provide an opinion, and her testimony is barred under Local Rule 6.2.2 with regard to expert disclosure and FRCP Rule 26.)

93. Disputed. (Reed was not disclosed as an expert, nor as a witness under Local Rule 6.2.2, and her testimony is inadmissible, also there is no foundation upon which Reed bases her testimony.)

94. Disputed. (Reed was not disclosed as an expert, nor as a witness under Local Rule 6.2.2, and her testimony is inadmissible, also there is no foundation upon which Reed bases her testimony.)

95. Disputed. (Reed was not disclosed as an expert, nor as a witness under Local Rule 6.2.2, and her testimony is inadmissible, also there is no foundation upon which Reed bases her testimony.)

96. Disputed. (Reed was not disclosed as an expert, nor as a witness under Local Rule 6.2.2, and her testimony is inadmissible; also there is no foundation upon which Reed bases her testimony.)

97. Disputed. (Reed was not disclosed as an expert, nor as a witness under Local Rule 6.2.2, and her testimony is inadmissible, also there is no foundation upon which Reed bases her testimony.)

98. Disputed. (Reed was not disclosed as an expert, nor as a witness under Local Rule 6.2.2, and her testimony is inadmissible, also there is no foundation upon which Reed bases her testimony.)

99. Disputed. (Reed was not disclosed as an expert, nor as a witness under Local Rule 6.2.2, and her testimony is inadmissible, also there is no foundation upon which Reed bases her testimony.)

100. Not disputed.

101. Disputed. (Tarter testifies that he is not aware of any credits on the masters he obtained. (Deposition of Tarter and Declaration of Tarter.)

102. Disputed in part. (Norman Andersen testified that he put stickers on 5,000 units which stated words to the effect "may contain some of the same footage as Crusade in Europe," in that he did not wish a customer to purchase Defendants' product if the customer had already purchased "Crusade in Europe.")

103. Not disputed.

104. Disputed. (what is characterized as the "new version" was the initial version released after possibly sales of 200 units. Ninety-nine (99) percent of the units sold were

sold with an introduction prepared by Defendants. (Deposition of Tarter and Dec. of Tarter.))

105. Disputed. (Misstates testimony of Andersen and Tarter.)

106. Disputed. (Tarter did extensive research, undertaking to go himself to the Library of Congress, where he is a registered researcher, and he undertook to personally review the files of the Library of Congress, and also requested a search of the Library of Congress. (Tarter Deposition and Declaration.))

107. Not disputed.

108. Not disputed.

109. Disputed in part. (The description of the letter is incomplete in that the letter also asserted that 20TH owned all rights to the videos.)

110. Disputed. (Misstates testimony of Andersen Deposition, and Declaration of Andersen. The response letter rejected Plaintiffs' position as owner of the videos.)

111. Disputed. (The response letter requested the basis of Plaintiffs' rights as owners of rights in the videos.)

112. Disputed. (Does not fully set forth letter, Plaintiffs again reassert in the second letter they own the videos.)

113. Not in dispute.

114. Disputed. (Not all of the information was sent as requested.)

115. Disputed. (After the lawsuit was filed, not at or about, this is a misquotation of the testimony.)

116. Inadmissible. (Attempts to disclose attorney-client privilege.)

117. Not in dispute.

118. Not in dispute.

119. Not in dispute.

120. Not in dispute.

121. Disputed. (Additional dialogue and information was to be added. (Declaration of Tarter.))

ADDITIONAL FACTS IN DISPUTE OR NOT IN DISPUTE FAVORING DEFENDANTS

1. The 1976 Introduction to the Book *Crusade in Europe* is a statement and representation of DOUBLEDAY as to the nature of the authorship of the book and the manner in which the Book was created.

2. The Acknowledgements of the Book by General Eisenhower reflect General Eisenhower's position as to who assisted him in the creation of the work *Crusade in Europe*.

3. Given the nature of the notes and references in the Book, DOUBLEDAY could not have supervised and controlled what memoranda, communications General Eisenhower would use in the book.

4. Given the 1976 Introduction of the Book and the nature in which it was created, DOUBLEDAY had no veto power or control over the actual contents of the Book.

5. The contents of *Crusade in Europe* was totally the discretion of General Eisenhower.

6. Other than soliciting the right to be the publisher, and providing encouragement, DOUBLEDAY undertook no other effort with regard to creation of the work *Crusade in Europe*.

7. During the 1940's and 1950's DOUBLEDAY would utilize the designation on copyright registrations designating DOUBLEDAY as the "employer for hire," and designating others as "author for hire."

8. DOUBLEDAY had a practice of designating individuals as authors on initial copyright registrations, not as employees for hire, but then asserting a claim to the renewal copyright as "proprietor as a work for hire."

9. DOUBLEDAY did not conceive of the concept of General Eisenhower's writing his memoirs.

10. DOUBLEDAY provided no specific direction and control over General Eisenhower's work.

11. Plaintiffs disclosed seventeen (17) documents and three (3) witnesses in their initial disclosure, and four (4) additional witnesses thereafter.

12. None of the documents selected and obtained from the McCormick Collection utilized in Plaintiffs Motion and Response were identified in the disclosure of Plaintiffs under Local Rule 6.2.2 or under FRCP Rule 37(a)(1).

13. None of the documents obtained from the Eisenhower Library were disclosed in the 6.2.2 disclosure.

14. Doubleday joined in the Motion with full knowledge that the facts stated, "There was no space to include work for hire nor instructions," were falsely made to the Court.

Respectfully submitted,

Dated: November 22, 1999

LAW OFFICES OF ALLEN HYMAN

By s/ Allen Hyman
ALLEN HYMAN
Attorneys for Defendants
ENTERTAINMENT DISTRIBUTING
and MARATHON MUSIC & VIDEO
and Defendant and Counter-Claimant
DASTAR CORPORATION

EXCERPTS FROM DECLARATION OF NORMAN ANDERSEN IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-7189 DT (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, etc., et. al.,

Plaintiffs,

v.

DASTAR CORPORATION, etc., et al.,

Defendants.

AND RELATED COUNTER-CLAIMS.

EXCERPTS FROM DECLARATION OF NORMAN ANDERSEN IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: December 13, 1999
Time: 10:00 a.m.
Place: Before the Honorable
Dickran Tevrizian,
United States District
Court Judge

I, Norman Andersen, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration, and I could and would testify as to these facts if called upon to do so.

2. Prior to 1995, my company, EDI, had distributed only audio product, and there had never been any legal challenge to any audio product distributed by EDI.

3. I was contemplating also having EDI sell video product, and Lanny Tarter, an independent producer, located In Los Angeles, suggested that "Crusade in Europe was in the public domain, and that we produce a video series called "Campaigns in Europe."

4. After the commencement of the lawsuit and in 1999, EDI discontinued shipping any new product of "Campaigns in Europe" or duplicating any new product, and sales were limited only to fulfilling prior commitments to customers. EDI ceased making any new sales of "Campaigns in Europe."

5. I attach, as Ex. No, 1, the shipping records of EDI.

* * *

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

This Declaration was executed on 23rd day of November, 1999, in Eugene, Oregon.

s/ Norman Andersen
Norman Andersen

Net Shipments: Campaigns In Europe: 30173/Z30173

10/95:	3	07/97:	211
11/95:	3	08/97:	162
12/95:	1	09/97:	891
01/96:	5	10/97:	1,746
02/96:	111	11/97:	2,256
03/96:	259	12/97:	2,140
04/96:	97	01/98:	145
05/96:	140	02/98:	24
06/96:	282	03/98:	672
07/96:	156	04/98:	2,640
08/96:	567	05/98:	1,433
09/96:	1	06/98:	378
10/96:	2,422	07/98:	260
11/96:	2,142	08/98:	(1,138)
12/96:	2,149	09/98:	225
01/97:	1,227	10/98:	1,544
02/97:	1,140	11/98:	1,249
03/97:	2,948	12/98:	1,126
04/97:	739	01/99:	344
05/97:	1, 507	02/99:	201
06/97:	1,156	03/99:	414
		04/99:	380
		05/99:	(587)
		06/99:	3

TOTAL: 33,774

sjh
07/27/99
EDI

DECLARATION OF LANNY LEE TARTER IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 98-7189 DT (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, etc., et. al.,

Plaintiffs,

v.

DASTAR CORPORATION, etc., et al.,

Defendants.

AND RELATED COUNTER-CLAIMS.

DECLARATION OF LANNY LEE TARTER IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: December 13, 1999
Time: 10:00 a.m.
Place: Before the Honorable
Dickran Tevrizian,
United States District Court Judge

I, Lanny Lee Tarter, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration, and I could and would testify as to these facts if called upon to do so.

2. I have read proposed finding of fact No. 78 of the Plaintiffs in this case which states: "In April 1995, Lanny

Tarter, former freelance video producer who became Dastar's director of video acquisitions in September 1995 . . . spoke about expanding Dastar's product line. . . ."

3. At the time of April, 1995, I was a free-lance owner of my own production companies, called "Lanny Lee Productions," and "Fireworks Entertainment." I attach page 28 of my deposition, where I reference the identity of these companies at the time when I independently created the video "Campaigns in Europe."

4. As I stated in my deposition (page 26 attached), I had previously created productions for "Rhino Home Video," "Viking Home Video" and "Handelman Home Video Division." I had previously undertaken to create such series as "Air War in Europe," "The History of Rommel," "Patten: Old Blood and Guts" and other titles.

5. In April, 1995, I purchased eight (8) Betacam tapes consisting of twenty-five (25) or twenty-six (26) episodes from a company called Wavelength Video which I state in my deposition at 45:5-12. I paid Wavelength $4,500.00 plus a series of crime scene photographs that I owned, that Wavelength stated they wished to have for their other projects. (My Depo. at 46.)

6. I then created WW II "Campaigns in Europe." I created-twenty-six (26) openings, title page openings for the twenty-six (26) chapters, I added what are called "photo grabs," which I included in the title pages, we undertook to process the footage to provide the titles a "Venetian blind" look so that the titles would appear like they were moving. I added music and radio show. I also added a two (2) dimensional opening title sequence in color.

7. Contrary to any implication in the statements of the Plaintiffs, as I testified in my deposition at page 55, "the film that I obtained, the six initial Betacam tapes had no credits whatsoever on them at all. (Depo at page 55.)

8. As I stated in my deposition, each show had no credits, each show started with a view of the Statue of Liberty, and then said "Crusade in Europe," and then had an emblem of the SHAPE Headquarters, and a picture of the book and Eisenhower's picture on the book. I stated, and my memory is that is how, I remember the footage I purchased in April, 1995. That footage which I modified had no credits. (I enclose my deposition pages 55 and 56.)

9. As part of the editing task in preparation of the video, I undertook to delete from the videos all images of General Eisenhower's book. (Attached is Depo. page 56.)

10. As I stated in my deposition, I was not aware that the original television show had credits to various people, and I did not know that it was a Twentieth Century Fox production. (Depo. at page 59.)

11. I was aware that the majority of the footage in the reels had come from the National Archives, and I placed a credit for the National Archives in the credits. (Depo. at page 69.)

12. As I stated in my deposition, I estimated that approximately one-third (1/3) of the material in "Campaign in Europe" was provided by my company that was not in "Crusade in Europe" (page 72).

13. I also testified that each show had two (2) summaries or recaps, one (1) by General Eisenhower and one (1) without General Eisenhower, and that we edited out the summary by General Eisenhower, and took the non-General Eisenhower summary and put it at the beginning of each segment. (Depo page 78.)

14. I am aware that on packaging of the product, Dastar placed an oval sticker that stated "contains film footage from the previously released 'CRUSADE IN EUROPE.'" (Depo. at 113.)

15. In September, 1995, I undertook to create what I call "wrap arounds." With regard to "Campaigns in Europe," I shot some additional footage from scratch where I produced, wrote and edited a new introduction for the videos which I undertook in September, 1995, so that the videos have additional footage of a new introduction, by a speaker with a script created and produced by Dastar. (Depo. at pages 42 and 43.)

16. As a result of a search I had undertaken prior to production (Depo. at page 39), I believed the "Crusade in Europe" was in the public domain. Thereafter, subsequent searches revealed both "Crusade in Europe" and "Crusade in the Pacific" were in the public domain. (Depo. at pages 136, 137.)

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

This Declaration was executed on 23 day of November, 1999, in Eugene, Oregon.

s/ Lanny Lee Tarter
LANNY LEE TARTER

DECLARATION OF PETER LEVATHES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTER-DEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-7189 FMC (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, and NEW LINE HOME VIDEO, INC., a New York corporation,

Plaintiffs,

v.

DASTAR CORPORATION, an Oregon corporation, ENTERTAINMENT DISTRIBUTING, an Oregon corporation, and MARATHON MUSIC & VIDEO, an Oregon corporation,

Defendants.

DASTAR CORP., an Oregon corporation,

Counterclaimant

v.

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, NEW LINE HOME VIDEO, INC., a New York corporation, and DOUBLEDAY, a division of BANTAM DOUBLEDAY DELL PUBLISHING GROUP, INC., a corporation,

Counterdefendants.

DECLARATION OF PETER LEVATHES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, AND IN SUPPORT OF PLAINTIFFS' AND COUNTER-DEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

Plaintiffs' and Counterdefendants' Cross-Motion

Date: December 20, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Florence-Marie Cooper

Defendants' Motion

Date: November 22, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Florence-Marie Cooper

DECLARATION OF PETER LEVATHES

I, PETER LEVATHES, declare:

1. I was a Vice President of Twentieth Century Fox Film Corporation ("Fox") in the late 1940's and in that capacity arranged and oversaw the production of Fox's multi-part documentary television series *Crusade in Europe*, which was based on the book of the same name written by General Dwight D. Eisenhower, later the President of the United States. I joined Fox in 1938 as special assistant to Spyros

Skouras, the president of Fox at that time. I assisted Mr. Skouras on various legal matters involving Fox. After leaving Fox in the Spring of 1942, several months after the Japanese invasion of Pearl Harbor, to work for the FBI overseas on confidential assignments relating to the Allied defense of the War, I then returned to Fox in 1945. At that time, I was made the head of entertainment short subjects, a position I held until 1952. I have personal knowledge of the facts set forth herein.

2. During the period before World War II and continuing during the period immediately afterward, the movie theatres in this country typically played a number of different kinds of trailers and short subjects before showing the main feature. The short subjects usually included an entertainment short subject — such as a feature on visiting the seashore — and a news piece. People looked to movies theatres in those days as a major source of their news. Television was not then the popular medium it is today, and it was not a significant source of news for most people.

3. As the head of entertainment short subjects, I was responsible for producing and distributing the trailers and short subjects for Fox films. I was also in charge of the distribution of the *March of Time*, a monthly news feature produced by Time, Inc. that provided in-depth coverage of news events and that was also shown prior to Fox films.

4. In late 1946, I approached Mr. Skouras with the idea that Fox should get into the television business. I believed television would become a major vehicle for the delivery of entertainment and news programming. Mr. Skouras told me to explore the idea, and put me in charge of Fox's incipient television division. As the head of Fox's television efforts from 1946 to 1952, I looked for opportunities to develop and distribute television programming.

5. Sometime before General Eisenhower's book *Crusade in Europe* (the "Book") was published, I became aware that the Book was being written. I had great respect for General Eisenhower and his accomplishments during World War II; he was a national hero and very popular. I believed that there would be great interest in General Eisenhower's personal experiences and perspectives relating to the War. I thus conceived of the idea of Fox doing a television documentary on that subject. I was not interested in doing simply another piece on the War, as I felt that the American public had been inundated with War footage. My goal was to do a multi-part documentary on ***Eisenhower's story*** as told by the General.

6. Therefore, I contacted Doubleday & Co., publishers of the Book, about acquiring the television rights and obtained a draft of the Book. After reading the draft, I negotiated for Fox the deal with Doubleday under which Fox, through one of its divisions, Twentieth Century – Fox Television Productions, Inc. ("Fox Division"), obtained the sole and exclusive television rights in the Book. The license agreement that reflects the Fox Division's deal with Doubleday is attached hereto as Exhibit A. The agreement was signed by Mr. Skouras on the Fox Division's behalf and is dated November 20, 1948.

7. I also enlisted Time's *March of Time* unit, whose news features I had long admired and with whom I had an existing relationship since Fox distributed the *March of Time*, to produce the television series for Fox based on the Book. I discussed the potential project with Arthur Tourtellot, an executive and highly talented writer for the *March of Time*. I also negotiated the agreement with Time (the "Time Agreement") setting forth the terms of the deal. A copy of the Time Agreement, signed by Mr. Skouras on the Fox Division's behalf and dated December 3, 1948, is attached hereto as Exhibit B.

8. I informed Time during the negotiations that the *Crusade in Europe* television series (the "*Crusade in Europe* Series") had to be faithful to the Book and of high quality. I wanted a television series that professionally conveyed General Eisenhower's view of the War as captured in his Book. These goals are reflected in the Time Agreement itself. First, it states that the *Crusade in Europe* Series produced by Time must be "based upon or illustrating the work entitled 'CRUSADE IN EUROPE', by Dwight D. Eisenhower." Exh. B ¶1(a). Second, the Time Agreement gave the Fox Division and Doubleday the right to review the script and film for individual episodes, and Time agreed to eliminate any portion of the script and any original photography that was determined to adversely affect General Eisenhower's reputation. *Id.* ¶¶1(b) – (d). Third, the Time Agreement states that "Time acknowledges that the quality of the work entitled "CRUSADE IN EUROPE" and the high standing of its author require that all of the Pictures [individual episodes of the television series] be of high standing and quality." *Id.* ¶9.

9. Acting on the Fox Division's behalf, I worked closely with Time, principally through Mr. Tourtellot, on the adaptation of the Book into a television series and on the creation of the 26 individual episodes of the *Crusade in Europe* Series. I reviewed and commented on the scripts and the pictures, and oversaw other aspects of the production process. This was a major project that involved not only developing scripts for more than two dozen separate one-half hour episodes, but also selecting and assembling footage, preparing connecting materials, doing a narration, and deciding on and incorporating the music. Mr. Tourtellot frequently called me with questions and to discuss the project. The final work product was the result of a close collaboration between the Fox Division and Time. In that connection, the Time Agreement specifically provided that both would receive credits in the titles for the *Crusade in Europe* Series. Ex. B ¶11.

10. Under the Time Agreement, the Fox Division contracted to pay Time $11,250 per episode for 26 episodes and to pay the cost of any music rights. Exh. B ¶7.

11. As I had desired and the Time Agreement contemplated, the *Crusade in Europe* Series was very closely based on, and illustrated, the Book. The *Crusade in Europe* Series, like the Book, told General Eisenhower's story of the War through his words and eyes. As such, it used a great deal of text from the Book; selected and produced footage that captured the images described in the Book; conveyed General Eisenhower's perspective on the War as articulated in the Book; and followed the Book's structure, format, and content.

12. When the *Crusade in Europe* Series was first shown on television in 1949, it was well received and was considered successful by the measures used at that time.

13. I have been ill the last month and was not in sufficient health to sign this declaration until now.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on this 6th day of December, 1999, at Washington, District of Columbia.

s/ Peter Levathes
Peter Levathes

License Agreement (Exhibit A)
at page S.App. 61
of the Supplemental Joint Appendix

Production Agreement (Exhibit B)
at page S.App. 73
of the Supplemental Joint Appendix

EXCERPTS FROM PLAINTIFFS' AND COUNTER-DEFENDANTS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-7189 FMC (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, and NEW LINE HOME VIDEO, INC., a New York corporation,

Plaintiffs,

v.

DASTAR CORPORATION, an Oregon corporation, ENTERTAINMENT DISTRIBUTING, an Oregon corporation, and MARATHON MUSIC & VIDEO, an Oregon corporation,

Defendants.

* * *

PLAINTIFFS' AND COUNTERDEFENDANTS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY ADJUDICATION OF ISSUES

Plaintiffs' and Counterdefendants' Cross-Motion

Date: December 20, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Florence-Marie Cooper

Defendants' Motion

Date: December 20, 1999
Time: 10:00 a.m.
Place: Courtroom of the Hon. Florence-Marie Cooper

* * *

IV. PLAINTIFFS ARE ENTITLED TO SUMMARY ADJUDICATION ON THEIR REVERSE PASSING OFF CLAIM UNDER THE LANHAM ACT

Defendants have engaged in classic "reverse passing off" by bodily appropriating the *Crusade* Series and Videos without plaintiffs' authorization *and* by failing to credit plaintiffs in their repackaged *Campaigns* video series. This conduct violates Section 43(a) of the Lanham Act. Defendants have tried to escape this reality by arguing that plaintiffs do not have standing to sue and that, in any case, plaintiffs have lost no goodwill as the *Crusade* Series and Videos are in the public domain. Plaintiffs disproved *both* of these arguments in their opposition to defendants' motion and in plaintiffs' cross-motion.

First, plaintiffs have demonstrated that standing to sue under the Lanham Act is *not* limited to authors, but also includes parties that have "a reasonable interest to be protected from false advertising." (Opening Br. at 23:1-24:22 (*quoting Lamothe v. Atlantic Recording Corp.*, 847 F.2d 1403, 1405 (9th Cir. 1988)). Plaintiffs clearly have such an interest. They contributed to the creation of, and/or have a financial interest in, the *Crusade* Videos. *Id.* Second, plaintiffs

disposed of defendants' lack-of-goodwill argument on the ground that because defendants have taken *all* credit for *Campaigns* without providing attribution to plaintiffs for the *Crusade* Series and Videos, plaintiffs are losing the opportunity to be associated with a quality film production, regardless of whether the *Crusade* Series and Videos are in the public domain. (*Id.* at 24:5-19.)

Defendants now make two additional arguments. First, defendants contend that a reverse passing off claim under the Lanham Act may not be based on the copying of a work in the public domain.[21] (Defs' Opp. Br. at 22:27-23:2, 26:26-27:6.) Second, defendants question whether they can be held liable for reverse passing off if the copy of the *Crusade* Series that they used to create *Campaigns* did not include credits. (*Id.* at 26:20-25.) As shown below, neither argument has merit.[22]

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21. This contention seems to be similar to defendants' lack-of-goodwill argument, but broader, in that it would deny Lanham Act protection to anything in the public domain. If that were correct, The Disney Company, for example, would be unable to protect its rights to the "Mickey Mouse" characters after the copyrights in said characters expire. That is *not* the law. *See, e.g., Frederick Warne & Co., Inc. v. Book Sales Inc.*, 481 F. Supp. 1191, 1194-1196 (S.D.N.Y. 1979) ("dual protection under copyright and trademark laws is particularly appropriate for graphic representations of characters").

22. Defendants also suggest that "by adding new introductions, and undertaking extensive editing" they cannot be found to have bodily appropriated the *Crusade* Series. (Defs' Opp. Br. at 23:14-27.) Defendants assert that they "edit[ed] out all references to Gen. Eisenhower, and most of the elements in the twenty six (26) reels, which included verbatim expression of *Crusade in Europe*, and . . . added some additional music, and retitled and rearranged the 26 reels. (*Id.* at 23:9-23.) In fact, it is not genuinely disputed (as defendants claim to dispute, but offer no evidence to contradict) that (1) the only references to Gen. Eisenhower that defendants deleted were the images of the Book that briefly appeared at the beginning of each of the 26 chapters of the *Crusade* Series (*see* Defs'

(Cont'd)

A. A Party May Not Falsely Designate The Origin Of A Work Even If It Is In The Public Domain.

In an attempt to substantiate their argument that plaintiffs have no Lanham Act claim because the Book is allegedly in the public domain, defendants "challenge" plaintiffs to "present a single authority where a District Court found 'reverse passing' off based upon claims of lack of attribution of elements to a work that went into the public domain." (Defs' Opp. Br. at 23:9-12.) There *is* such authority. Courts have held that a reverse passing off claim is different from a copyright claim and may be maintained in the absence of copyright protection. For example, in *Waldman Publishing Corp. v. Landoll, Inc.*, 43 F.3d 775 (2d Cir. 1994), plaintiff published a line of children's books adapted from popular public domain literary works. Defendant subsequently sold books under its own name that were copies of plaintiff's. At the time of defendant's copying, plaintiff had not registered a copyright in its modifications to the underlying works. *Id.* at 778-79. When plaintiff sued for reverse passing off under the Lanham Act, defendant made *the same argument* defendants make here — namely, that it could not be held

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(Cont'd)

Resp. to Pls' Stmt. Of Uncontroverted Facts and Conclusions of Law at ¶¶84-85); (2) *Campaigns* directly copied or very closely paraphrased 51.2% of the Book's total pages (447 pages), consisting of the Book's *most important* parts, namely Gen. Eisenhower's own thoughts about the War (*id.* at ¶¶89-90); and (3) the only content from the *Crusade* Series that was rearranged by defendants was the "recap" that was moved to the beginning of *Campaigns* and retitled "preview." (*Id.* at ¶¶84-85.) The other edits defendants note were superficial changes to chapter titles and the like: Thus, defendants' limited changes were all minor and do *not* alter the fact that defendants copied substantially all of the *Crusade* Series. *Cleary v. News Corp.*, 30 F.3d 1255, 1261-62 (9th Cir. 1994) (slight modifications insufficient as matter of law to defeat Section 43(a) claim where substantially all of work was copied).

liable because plaintiff's books had no copyright protection.[23] *Id.* at 781. The Second Circuit rejected this argument, holding that a "claim of reverse passing off is separate from a claim of copyright infringement." *Id.* at 781. The Court reasoned:

> The Copyright Act and the Lanham Act address different harms. Through a copyright infringement action, a copyright owner may control who publishes, sells or otherwise uses a work. Through a Lanham Act action, an author may ensure that his or her name is associated with a work when the work is used.

Id. Accord Summit Machine Tool Manufacturing Corp. v. Victor CNC Systems, Inc., 7 F.3d 1434, 1438 (9th Cir. 1993) (Lanham Act claims independent of Copyright Act claims).[24] Thus, the *Waldman* Court concluded that even if copyright law did not prohibit defendant from copying plaintiff's books, defendant could be held liable under the Lanham Act for passing off plaintiff's books as its own.

Similarly, in *Dodd v. Fort Smith Special School District No. 100*, 666 F. Supp. 1278, 1279-81 (W.D. Ark. 1987), plaintiff wrote a biography of William Orlando Darby.

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23. While in *Waldman* the defendant relied on the failure to register the copyright to defeat the Lanham Act claim, this distinction is immaterial. The claimed lack of copyright protection was asserted to be the fatal flaw to the Lanham Act claim in both cases.

24. Defendants argue that the *Summit*, *Smith*, and *Cleary* decisions cited by plaintiffs do not support the position that their Lanham Act claim is independent of their copyright claim. (Defs' Opp. Br. at 24:1-26:16.) However, *Summit*, in fact, supports this position, affirming the District Court's analysis that a party may be liable for reverse passing off even if the party could lawfully copy the product. 7 F.3d at 1437. In contrast, *Smith* and *Cleary* were cited by plaintiffs with regard to the essential elements of a reverse passing off claim, *not* to support plaintiffs' position on the interaction between the Lanham and Copyright Acts. (Opening Br. at 22:6-21.)

The biography was not copyrighted; it was then published by defendant without plaintiff's consent, falsely identifying defendant as the author. *Id.* at 1282-85. Notwithstanding the lack of copyright protection, the court upheld a reverse passing off claim. *Id.*

There is other *ample* support for the proposition that the fact that a work is in the public domain does *not* rule out a Lanham Act claim. *See, e.g., Comedy III Productions, Inc. v. New Line Cinema*, 1998 U.S. Dist. LEXIS 10637, *16 (C.D. Calif. 1998) (legally enforceable trademark interests may exist in public domain work even though not protected by copyright); *Frederick Warne & Co.*, 481 F. Supp. at 1196 ("fact that a copyrightable character or design has fallen into the public domain should not preclude protection under the trademark laws"); *Universal City Studios, Inc. v. Nintendo Co., Ltd.*, 578 F. Supp. 911, 919 (S.D.N.Y. 1983), *aff'd*, 746 F.2d 112 (2d Cir. 1984) ("finding of fact that the King Kong story was in public domain . . . is not dispositive of the trademark issue"); *Tempo Communications, Inc. v. Columbian Art Works, Inc.*, 1983 U.S. Dist. LEXIS 13310, *1-3 (N.D. Ill. 1983) (Lanham Act may be asserted to protect features of public domain work for copyright purposes). Thus, defendants' assertion that the *Crusade* Series is in the public domain is *not* a valid defense to plaintiffs' Lanham Act claim.[25]

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25. The separateness and independence of the right against false designation of origin protected by the Lanham Act and the interests protected by copyright law are well-established, not only in case law but also in academic and legislative commentary. Paul Goldstein, Copyright §15.23 (2d ed. 1999) (Supp Jahss Exh. L). Recognition that the Lanham Act provides rights that are separate and distinct from the protections under the Copyright Act was integral to Congress' passage of the Berne Convention Implementation Act of 1988, an international agreement for the protection of works of authors of all kinds. S. Rep. No. 352, 100th Cong., 2nd Sess. 10 (1988) at pp. 3714-15, *reprinted in* 1988 U.S.C.C.A.N. 3706, 3707-11, 3714-15 (Supp. Jahss Exh. M).

B. Defendants Are Liable For False Designation Of Origin Regardless Of Whether They Removed Credits From The *Crusade* Series

Contending that the *Crusade* Series that defendants copied in creating *Campaigns* did not have credits, defendants question whether they can be held liable for reverse passing off if they did not actually remove the credits. (Defs' Opp. Br. at 26:22-25.) Assuming *arguendo* that, for some reason, the credits were missing from the *Crusade* Series copied by defendants, that fact would not alter the conclusion that defendants violated the Lanham Act by falsely taking credit for the videos sold as *Campaigns*. Defendants' contention is inconsistent with the plain language of Section 43(a), which applies to "any false designation of origin." There is *no* requirement in the statute that a true designation of origin be removed in order for there to be a Lanham Act violation for false designation of origin, *nor* do defendants cite any authority for such a requirement.

Consequently, there is no requirement under the Ninth Circuit test for reverse passing off that the original designation of origin be removed. This test provides that "'[a] defendant may . . . be guilty of reverse palming [*i.e.*, passing] off by selling or offering for sale another's product that has been modified slightly and then labeled with a different name.'" *Summit*, 7 F.3d at 1437. In addition, this test is consistent with the policy behind reverse passing off — which is to ensure that consumers receive accurate information regarding the true source of a product. *Smith v. Montoro*, 648 F.2d 602, 607 (9th Cir. 1981). The question is simply whether the designation given in the offending work is *false*.

Here, the designation in *Campaigns* is clearly false. The only credits provided are for defendant Dastar, *not* plaintiffs. Thus, *Campaigns* conceals the fact that the seven hours of tape is the product of someone else's work. Whether or not the particular set of *Crusade* Series copied by

defendants had credits, defendants *knew* that the work was created by someone other than themselves. Defendants' principals testified that they had watched the *Crusade* Series in their youth. (Defs' Resp. to Pls' Stmt. of Uncontroverted Facts and Conclusions of Law at ¶¶78-79.) In addition, Lanny Tarter admits that when Dastar was considering doing a pirated version of the *Crusade* Series, he consulted a document that disclosed Fox's connection to the production. (Tarter Depo. 35:25-36:6 and Exh. 41 (Supp. Jahss Exhs. J and K).) Yet, defendants blatantly ignored this, and took sole credit for themselves.[26] Defendants' egregious behavior is in sharp contrast to that of SFM, which licensed the necessary rights *and* properly gave attribution to the deserving parties in the credits that SFM prepared for the *Crusade* Videos based on the *Crusade* Series. Thus, plaintiffs are entitled to summary adjudication of their Lanham Act claim.

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26. Therefore, even if copyright law did not prevent defendants from coping the *Crusade* Series or Videos to create *Campaigns*, defendants owed credits to Fox and others. The credits given in the *Crusade* Videos would have been appropriate, recognizing "20th Century Fox" for arranging the production and "SFM" and "New Line Home Video" for bringing the *Crusade* Series to modern audiences. (*See* Notice of Lodging Exh. A (copy of *Crusade* Videos).) Additionally, for purposes of avoiding consumer confusion, the packaging for *Campaigns* would have to clearly indicate that *virtually all* of it is copied from the *Crusade* Series and Videos. Absent such notice, consumers might buy both the *Crusade* Videos and *Campaigns* only to discover they have bought essentially the same videos. *See PPX Enterprises, Inc. v. Audiofidelity, Inc.*, 746 F.2d 120, 124-26 (2d Cir. 1984) (Lanham Act protects against misrepresentations regarding nature of defendant's product that create confusion among consumers and raise doubts about the nature of plaintiff's own product).

V. PLAINTIFFS ARE ENTITLED TO SUMMARY ADJUDICATION ON THEIR UNFAIR COMPETITION CLAIM UNDER CALIFORNIA LAW

Because defendants engaged in reverse passing off in violation of the Lanham Act, plaintiffs are also entitled to summary adjudication of their claims for unfair competition under California statutory and common law. *Summit*, 933 F. Supp. at 942-43.

VI. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that their cross-motion for summary adjudication of issues be granted in its entirety.

Dated: December 6, 1999

O'MELVENY & MYERS LLP
By s/ Neil S. Jahss
Neil S. Jahss
Attorneys for Plaintiffs

EXCERPTED TRANSCRIPT OF PROCEEDINGS DATED AUGUST 9, 2000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HON. FLORENCE-MARIE COOPER,
JUDGE PRESIDING

No. CV-98-7189-FMC(Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, and NEW LINE HOME VIDEO, INC., a New York corporation,

Plaintiffs,

vs.

DASTAR CORPORATION, an Oregon corporation, ENTERTAINMENT DISTRIBUTING, an Oregon corporation, and MARATHON MUSIC & VIDEO, an Oregon corporation,

Defendants.

* * *

[Commencing at page 13]

DIRECT EXAMINATION

BY MS. CENDALI:

Q. Mr. Andersen, you are the president of Dastar Corporation, correct?

A. Correct.

Q. And Dastar is one of the defendants in this action, correct?

A. Correct.

Q. You understand that I represent the plaintiffs in this action, right?

A. Right.

Q. Am I correct that in 1975 you purchased a company called American Stereo that later changed its name to Dastar?

A. Yes.

Q. Dastar is an Oregon corporation headquartered in Eugene, Oregon; is that right?

A. Yes.

Q. Is it true that defendant Entertainment Distributing is a dba, a trade name of Dastar and not a separate [14] corporation?

A. That is correct.

Q. Do you sometimes refer to Entertainment Distributing as EDI?

A. That is correct.

Q. In fact, you sometimes even use the letterhead with the name "EDI"?

A. Yes.

Q. When we see that letterhead, we are really referring to Dastar Corporation, correct?

A. Correct.

Q. Is it also true that defendant Marathon Music & Video is another dba, a trade name of Dastar and not a separate corporation?

A. That is correct.

Q. Now, Mr. Andersen, in addition to being president of Dastar, isn't it true that you also own 50 percent of the stock?

A. That is correct.

Q. And your wife, Diane Andersen, owns the other 50 percent; is that right?

A. Correct.

Q. The fiscal year for Dastar runs from October 1 to September 30; is that, right?

A. Yes.

[15] Q. Dastar's gross revenues for the fiscal year end September 30, 1998, were approximately $25 million, correct?

A. Correct.

Q. And Dastar's gross revenues for the fiscal year ending September 30, 1999, were also approximately $25 million, right?

A. I believe that's correct.

Q. Isn't it true, Mr. Andersen, that Dastar's business today consists of selling videos and audio CDs?

A. Correct.

Q. And Dastar began producing video sets for sale in 1995, correct?

A. That is correct.

Q. In making its videos, isn't it true that Dastar frequently takes work that originally appeared elsewhere and then repackages it?

MR. HYMAN: Objection. Ambiguity as to the word "elsewhere."

THE COURT: Sustained.

BY MS. CENDALI:

Q. Isn't it true, Mr. Andersen, that Dastar makes most of its videos from archival footage and material that it did not actually shoot and film itself?

A. That is correct.

Q. Mr. Andersen, Dastar sells its videos primarily to [16] mail-order companies, warehouse clubs and some other major retailers, correct?

A. Correct.

Q. And Dastar has released at least 150 videos since 1955; isn't that true?

A. Yes.

Q. When Dastar releases videos, isn't it true that usually they're video sets. They are not single videos but, typically, Dastar releases collections of videos on a subject, correct?

A. Correct.

Q. And one of the video sets that Dastar has released is a video set called "Campaigns in Europe," correct?

A. Yes.

Q. And "Campaigns in Europe" is one of Dastar's top sellers, isn't it, Mr. Andersen?

MR. HYMAN: Objection as to timeframe.

THE COURT: Sustained.

BY MS. CENDALI:

Q. Mr. Andersen, isn't it true, on a historic basis, Dastar's video "Campaigns in Europe" is one of its top sellers?

MR. HYMAN: Also objection as to top sellers.

THE COURT: Overruled.

You may answer.

[17] THE WITNESS: Can you please clarify that a little bit.

BY MS. CENDALI:

Q. Well, Mr. Andersen — Mr. Hyman, I'm going to look at page 276 of Mr. Andersen's deposition.

MR. HYMAN: What lines, please.

MS. CENDALI: Lines 20 — starting at lines 21.

Q. Mr. Andersen, do you remember that I took your deposition last year?

A. Yes, I did.

MR. HYMAN: Objection. Irrelevant.

THE COURT: Overruled.

BY MS. CENDALI:

Q. Do you remember that we were in Eugene, Oregon, at that time?

A. Yes.

Q. Do you remember that you were under oath?

A. Yes.

Q. Do you remember that there was a court reporter there transcribing your testimony?

A. Yes.

Q. Do you remember that you had the opportunity to read your testimony at that time and make any corrections if you so desired?

A. Yes.

[18] Q. Do you remember that on that day I asked you:

QUESTION: Okay. I believe you said that "Campaigns in Europe" was a top seller for the company.

ANSWER: —

MR. HYMAN: I don't have a line.

MS. CENDALI: Starting at line 21, Mr. Hyman.

MR. HYMAN: Thank you.

BY MS. CENDALI:

Q. And your answer was "yes," correct?

MR. HYMAN: Objection, argumentative; and also no foundation with this witness as to what he testified.

THE COURT: Overruled.

THE WITNESS: At that time the answer would have been "yes."

MS. CENDALI: Thank you, Mr. Andersen.

Q. Now, you understand, don't you, that "Campaigns in Europe" is the subject of this lawsuit?

A. Yes.

Q. Who first got the idea for Dastar to produce "Campaigns in Europe"?

A. Lanny Tarter.

Q. Is Lanny Tarter the person you hired in 1995 to be the video producer for the company?

A. That is correct.

[19] Q. Mr. Tarter also sometimes goes by the name of Lanny Lee?

A. That's correct.

Q. That name might appear on documents from time to time?

A. That's correct.

Q. Isn't it true that you had known Mr. Tarter for many years prior to hiring him?

A. Correct.

Q. Are his responsibilities today the creation, development and supervision of the video department at Dastar?

A. That's correct.

Q. Mr. Tarter first raised the idea of releasing what became "Campaigns in Europe" in approximately April of 1995; isn't that true?

A. April or May. I'm not quite sure.

Q. This was a few months before Mr. Tarter moved to Oregon to join Dastar, right?

A. Correct.

Q. Now, at this time you were interested in expanding Dastar's business into the video area, correct?

A. Correct.

Q. And you thought video sets about World War II would sell well in light of the interest generated by the war's 50th anniversary, right?

[20] A. Correct.

Q. Now, Mr. Tarter told you in the spring of 1995 that the documentary television series "Crusade in Europe" was in the public domain, correct?

A. That is correct.

Q. So you felt you could use the "Crusade" series to create "Campaigns in Europe," right?

A. Right.

Q. And Dastar, in fact, released "Campaigns" in October of 1995?

A. Correct.

Q. Now, isn't it true, Mr. Andersen, that you had learned of the "Crusade in Europe" series prior to Mr. Tarter mentioning it?

MR. HYMAN: Objection as to what is meant by the "Crusade in Europe" series. It's ambiguous.

THE COURT: Are you asking if he knew of the existence of the video series?

MS. CENDALI: I'm asking Mr. Andersen whether he knew of the existence of the documentary television series "Crusade in Europe."

THE WITNESS: Yes, I did.

BY MS. CENDALI:

Q. In fact, Mr. Andersen, isn't it true that you saw the "Crusade in Europe" series on television in 1953 when you [21] were 12 years old?

A. Correct.

Q. And isn't it true that even as a 12-year-old boy when you saw "Crusade in Europe" on TV, you understood that it was based on General Dwight D. Eisenhower's war memoirs by the same name?

A. That is correct.

Q. And later in life, when you discussed the "Crusade in Europe" series with Mr. Tarter, you still understood that it was based on Dwight D. Eisenhower's book, didn't you?

A. Correct.

Q. But isn't it true, Mr. Andersen, that prior to releasing "Campaigns," Dastar gave no consideration as to whether General Eisenhower's book, "Crusade in Europe," was in the public domain?

A. That is correct.

Q. Isn't it also true, Mr. Andersen, that prior to releasing "Campaigns," Dastar did not seek an opinion from any lawyer as to whether such a release would infringe on anyone's rights?

A. Not from a lawyer, no.

Q. Mr. Andersen, I'd like to show you Plaintiff's Exhibit 3, or Exhibit 3, as we're using the same numbers, which is the physical volume of "Crusades in Europe." May I approach and hand the witness —

[22] THE COURT: Yes.

MS. CENDALI: I see that Mr. Hyman has his own set of exhibits.

THE COURT: Sorry.

MS. CENDALI: May I hand it directly to the witness, Your Honor?

THE COURT: Yes.

BY MS. CENDALI:

Q. Do you recognize Plaintiff's Exhibit 3, Mr. Andersen?

A. Yes.

Q. And is that, in fact, the "Crusade in Europe" video set?

MR. HYMAN: Objection as to foundation.

BY MS. CENDALI:

Q. Can you identify Exhibit 3, sir?

MR. HYMAN: Objection as to foundation as to what this witness knew. No basis or foundation.

THE COURT: I'll allow it.

THE WITNESS: It is a six-video set of "Crusade in Europe."

BY MS. CENDALI:

Q. And isn't it true, Mr. Andersen, that you saw "Crusade in Europe," Plaintiff's Exhibit 3, in a mail-order catalog in November of 1995?

A. No. I believe it was much later than that.

[23] Q. Well, let's take a look at your deposition, Mr. Andersen.

MR. HYMAN: I'd object, Your Honor, to the saying let's take a look at. If there is impeachment, give the page and line numbers and let's move on.

THE COURT: I don't think that is objectionable. If you'll just recite the page and line numbers.

MS. CENDALI: Please, the page is 82 to 83. It begins at line 14.

MR. HYMAN: Just a second, please. Just a second.

(Pause in the proceedings.)

MR. HYMAN: 82 to 83 at line 14.

BY MS. CENDALI:

Q. Do you have the line, sir?

MR. HYMAN: Go ahead.

BY MS. CENDALI:

Q. And on that day, isn't it true that my question was:

QUESTION: Mr. Andersen, I would like you to take a look at Plaintiff's Exhibit 3 and tell me if you can identify it.

MR. HYMAN: Objection as to what is meant by "identifying it."

MR. HYMAN: Objection as to reading the objection. It's colloquy.

THE COURT: There is no jury here, Mr. Hyman. I [24] don't think it makes any difference.

MS. CENDALI: (Reading:)

QUESTION: Go ahead.

ANSWER: It appears to be a six-video set of "Crusade in Europe."

QUESTION: Had you seen that video set prior to today?

ANSWER: I have seen it in a mail-order catalog, this set. I am sure it is the same set. It was called "Crusade in Europe."

QUESTION: When do you recall approximately was the first time you saw that in the mail-order catalog?

ANSWER: Approximately in 1995.

(End of reading deposition testimony.)

BY MS. CENDALI:

Q. Mr. Andersen, isn't it true that you saw Plaintiff's Exhibit 3 in a mail-order catalog before Dastar released "Campaigns in Europe"?

A: I saw a "Crusade in Europe" video set. I could not tell you from the catalog that it was this particular set.

Q. Turning again to the deposition, Mr. Hyman, on page 83, starting at line 3.

QUESTION: When do you recall approximately was the first time you saw that in a mail-order [25] catalog?

ANSWER: Approximately in 1995 — '95, 1995.

QUESTION: Was that before or after Dastar released "Campaigns in Europe"?

ANSWER: I saw this before.

(End of reading deposition testimony.)

BY MS. CENDALI:

Q. Now, Mr. Andersen, Plaintiff's Exhibit 3, the "Crusade in Europe" video set is about World War II, isn't it?

A. Yes.

Q. And you knew it was about World War II when you saw it in the catalog in 1995, didn't you?

A. Yes.

Q. Isn't it true, Mr. Andersen, that you consider other video sets about World War II to be in competition with video sets that Dastar produces about World War II?

A. That's not necessarily true.

MS. CENDALI: Mr. Hyman, let's look at page 85 of Mr. Andersen's deposition transcript at line 15.

QUESTION: Do you consider other video sets about World War II to be in competition with video sets Dastar produces about World War II?

Objection.

ANSWER: Yes.

(End of reading deposition testimony.)

[26] BY MS. CENDALI:

Q. Isn't it true, Mr. Andersen, that consumers interested in World War II might only be interested in purchasing a limited number of video sets about the period?

MR. HYMAN: Objection as to foundation. As to what purchasers might think.

THE COURT: I'm going to sustain that objection. I'll ask you to hold on for a minute because my computer just froze on me. It's nice that we have these modern ways of notetaking.

Okay. I'm back.

MS. CENDALI: I understand the problem, Your Honor all too well.

Q. Well, Mr. Andersen, would you agree that people are not likely to want two copies of the same video set about World War II?

MR. HYMAN: Objection again as to this person's foundation as to what people may or may not want.

THE COURT: Well, the witness is obviously in marketing. He must have some ideas about what people might want to buy so I don't think it's out of his area of expertise.

THE WITNESS: Would you ask the question again.

BY MS. CENDALI:

Q. Certainly. Would you agree that people are not likely [27] to want two copies of the same video set about World War II?

A. That's correct.

Q. You don't think consumers have unlimited resources to buy as many videos as they want, do you?

MR. HYMAN: Objection. As to foundation and speculation.

THE COURT: I think it's not relevant in any event. I'll sustain the objection.

BY MS. CENDALI:

Q. Now, Mr. Andersen, isn't it true that you believe consumers might be upset if they buy a video set about World War II only to find, to their surprise, that it utilizes a lot of the same footage as the other videos?

A. Correct.

Q. In fact, isn't it true that at one point you ordered stickers bearing the legend, quote, "Contains Film Footage from the Previously Released 'Crusade in Europe'" to put on Dastar's "Campaigns in Europe" for this reason?

A. That's correct.

Q. The sticker, by the way, just said that it contained footage from "Crusade in Europe," right? It didn't state that the "Campaigns" actually was "Crusade," did it?

A. That's correct.

Q. Isn't it true, though, Mr. Andersen, that Dastar only ordered those stickers in late January of 1997, more than a [28] year after "Campaigns" had been released?

A. Correct.

Q. And isn't it true that Dastar only placed a single order for 5,000 stickers even though it has sold almost 35,000 video sets?

A. I don't believe we had sold 35,000 at that point.

Q. But you only placed a single order for 5,000 stickers?

A. Correct.

Q. Now, Mr. Andersen, Dastar purchased a high-quality copy of the "Crusade in Europe" series in order to make "Campaigns," right?

A. Say that again. A high copy — a high-quality copy?

Q. That's right. Didn't Dastar purchase a copy of "Crusade in Europe" of sufficient quality that it could be mass produced?

MR. HYMAN: My objection is to what are we referring to "Crusade in Europe"? My objection is to what are we referring to.

THE COURT: I'm going to assume that your question is referring to the video series unless you say otherwise. Is that okay? Would that be accurate?

MS. CENDALI: Yes, Your Honor. I try in my questions to say the "Crusade in Europe" series to the extent possible. When I refer to the "Crusade in Europe" series, what I am referring to is the television series [29] "Crusade in Europe."

When I refer to the "Crusade in Europe" book, I mean the book. So to rephrase my question, if there is any ambiguity:

Q. Isn't it, in fact, true, Mr. Andersen, that Dastar purchased a high-quality copy of the "Crusade in Europe" series in order to make "Campaigns"?

A. The original films, yes.

Q. And isn't it true that Mr. Tarter, at your request, located a copy of the "Crusade" series and arranged to have it copied so that Dastar could mass produce it?

A. That's not correct.

Q. Mr. Andersen, Dastar had no role whatsoever in creating the documentary series "Crusade in Europe," did it?

MR. HYMAN: Again, objection, documentary series being the original TV series? I just — maybe perhaps, Your Honor, we could talk about the original TV series and —

THE COURT: As opposed to the video?

MR. HYMAN: As opposed to — there is the original TV series, there is the plaintiff's video package, and there is the defendant's video package. So if we're talking about the original 26 episodes, television films, that's what we're talking about as opposed to — I'd like to just try to define that so we don't have any ambiguity.

BY MS. CENDALI:

[30] Q. Mr. Andersen, isn't it true that Dastar played no part in creating the book "Crusade in Europe"?

A. That's correct.

Q. Isn't it true that Dastar played no role in creating the television documentary series that you saw in 1953 called "Crusade in Europe"?

A. That's correct.

Q. Isn't it true that Dastar played no role in creating Plaintiff's Exhibit 3, the video set "Crusade in Europe"?

A. That is correct.

Q. And you knew that Dastar had no role in creating either the "Crusade" book or the "Crusade" series at the time Dastar released "Campaigns in Europe," right?

A. Right.

Q. Mr. Andersen, I'd like you now to look at Exhibit 4, a seven-volume box video set called "Campaigns in Europe." May I approach, Your Honor?

THE COURT: Sure.

BY MS. CENDALI:

Q. (Handing exhibit to witness.)

A. Thank you.

Q. Do you recognize Exhibit 4, Mr. Andersen?

A. Yes, I do.

Q. What is it?

A. It's upside down. It is the "Campaigns in Europe" [31] World War II seven-volume set produced by Dastar.

Q. You approved the title "Campaigns in Europe"; isn't that right?

A. The title really is "World War II Campaigns in Europe." I approved that.

Q. And you approved the title, "World War II Campaigns in Europe" instead of using the phrase "Crusade in Europe" because you wanted to make Exhibit 4 look like a new work, right?

A. Not correct exactly. Ask me again.

Q. Well, isn't it true, Mr. Andersen, that you wanted to make your "Campaigns in Europe" look like it was a new product?

A. Okay, yes.

Q. Isn't it true that you approved the packaging on Exhibit 4, "Campaigns in Europe," on an overall basis?

A. Correct.

Q. Now, Exhibit 4 states at the bottom, doesn't it, "Produced and Distributed by Entertainment Distributing," right?

A. Correct.

Q. Is it fair to say that the packaging of "Campaigns" gives credit to Dastar and its dba?

A. Yes.

Q. No other entity or person is given any credit on the [32] packaging of "Campaigns," are they?

A. Marathon Music & Video.

Q. That is another Dastar dba, right?

A. Correct.

Q. Isn't it true that nothing on "Campaigns" packaging would tell the consumer that anyone else had any role?

A. That is correct.

Q. Isn't it true that at the time you approved the packaging, you knew that it only gave credit to Dastar and its dba?

A. Correct.

Q. Now, Mr. Andersen, do you recall that at your deposition last summer, I asked you if Dastar deleted the credits from "Crusade in Europe" in producing "Campaigns in Europe"?

MR. HYMAN: Objection as to the relevance of what he recalls.

THE COURT: Sustained.

MS. CENDALI: Your Honor, I'm trying to show he changed his testimony from his deposition so that the relevance of what he recalls is —

THE COURT: I just didn't hear you ask any question related to what you've indicated he said at his deposition.

MS. CENDALI: Okay.

[33] THE COURT: So we missed a step.

THE WITNESS: Ask again, please.

BY MS. CENDALI:

Q. Mr. Andersen, isn't it true that at your deposition I asked you if Dastar deleted the credits from "Crusade in Europe" in producing "Campaigns"?

A. I don't recall now.

Q. Well, let me refresh your recollection. Let's turn to page 195 of the deposition transcript at line 19.

MR. HYMAN: Excuse me, please. Go ahead.

BY MS. CENDALI:

Q. Do you recall that I asked you the question starting on line 19:

QUESTION: Now, turning to the content of the video "Campaigns in Europe" itself, am I correct that one of the things Dastar did was delete the credits from "Crusade in Europe" in producing "Campaigns in Europe"?

ANSWER: Yes, that is correct.

(End of reading of deposition testimony.)

Does that refresh your recollection?

A. Yes, it does. Because on a correction page 195, line 24, I changed my deposition after thinking about what you meant by credits.

Q. Isn't it true, Mr. Andersen, that after your deposition [34] last July, you had the opportunity to read your deposition transcript and make any corrections?

A. That's correct.

Q. And isn't it true that for a year after your deposition, you never made any corrections?

A. I couldn't tell you the timeframe.

Q. Well, isn't it true, Mr. Andersen, that just yesterday, the day before trial, your attorney sent us a correction to your July 27th, 1999, deposition transcript changing your answer to my question to state: Dastar did not delete any credits?

A. I couldn't tell you when he sent it to you.

Q. You have no reason to believe that's not true, though, correct?

MR. HYMAN: Objection. Argumentative.

THE COURT: Sustained.

BY MS. CENDALI:

Q. Now, Mr. Andersen, isn't it true that in making "Campaigns," Dastar intentionally deleted all of the references to General Eisenhower's book "Crusade in Europe"?

A. That is correct.

Q. And this included the images of the book that appeared before each of the 26 chapters, correct?

A. Correct.

Q. Dastar wanted to make "Campaigns" look like it was a [35] new product so it wanted to delete those images, right?

A. Correct.

Q. Now, please look again at Exhibit 4, the "Campaigns in Europe" video set.

A. (Witness complies.)

Q. Am I correct that Exhibit 4 bears a copyright notice stating: Copyright 1995 Dastar Corporation?

A. Correct.

Q. And Dastar put that notice on to give the impression that it was a new work that Dastar owned the rights to, correct?

A. Okay, correct.

Q. And nothing on that notice tells the consumer that the material inside came from 1949, does it?

A. That's correct.

Q. Now, Mr. Andersen, Dastar uses things like copyright notices because it wants to protect its intellectual property rights, correct?

A. Correct.

Q. Dastar does not like it when its right are infringed, does it?

A. Of course not.

Q. I'd like you to look at Exhibit 32, a document dated July 15, 1997, to the Legal Affairs Department of Marathon Music & Video, Dastar's dba, from New Line Video, SFM [36] Entertainment, and Twentieth Century Fox Film Corporation. You should have an exhibit binder which I see you are picking up.

A. Which volume is it in?

Q. It's the first volume which has Exhibits 1 through 70.

A. (Looking at document.) Yes.

Q. Do you have it in front of you, sir?

A. Yes.

Q. Do you recall Dastar receiving Exhibit 32 in late July of 1997?

A. Yes, I do.

Q. Exhibit 32 is the first cease and desist letter that Dastar got about "Campaigns in Europe"; is that correct?

A. Well, it's about two packages, "Campaigns in Europe" and "Campaigns in the Pacific."

Q. That's correct, Mr. Andersen. And isn't it true that this was the first letter that Dastar got about "Campaigns in Europe"?

A. Correct.

Q. Now, turning your attention to paragraph 2 of the letter, am I correct that it states:

> New Line, Fox and SFM together are the exclusive distributors of the originals throughout the world. Marathon's unauthorized and unlawful distribution of the pictures constitutes an [37] infringement of the copyrights and proprietary rights of New Line, Fox and SFM.
>
> Marathon's actions violate federal law as well as state common-law principles of conversion and unfair competition.
>
> In addition to the potential criminal penalties Marathon may face as a copyright infringer, Marathon may be liable for treble damages for willful infringement as well as attorneys fees and court costs in a civil action brought by Fox New Line and SFM.

Do you see that, sir?

A. Yes.

Q. Were you aware of that paragraph at the time when you got this letter?

A. Yes, I was.

Q. The letter warned you, didn't it, that Dastar might be liable for treble damages for willful infringement?

A. Yes.

MR. HYMAN: Objection, Your Honor, as to the letter speaks for itself.

THE COURT: I'll allow the question.

THE WITNESS: The answer is yes.

BY MS. CENDALI:

Q. Now, Mr. Andersen, am I correct that Exhibit 32 goes on [38] to make three demands of Dastar?

A. Correct.

Q. And am I correct that the first demand-request that, quote:

> Marathon immediately cease and desist from distributing and offering the pictures for sale or license and stop all advertising of the pictures, unquote.

Do you see that in the first numbered —

A. Correct.

Q. Dastar didn't do that, did it?

A. No, it did not.

Q. The second demand states that, quote:

> Marathon immediately surrender to New Line all copies of the pictures and any promotional materials relating thereto in its possession or control and identify and account to New Line, Fox and SFM for all sales or licenses of the picture.

Do you see that, sir?

A. Yes.

Q. Dastar didn't do that either, did it?

A. No, we did not.

Q. The third demand states that, quote:

> Marathon inform us in detail of both the [39] means by which Marathon obtained copies of the pictures and the names and addresses of the parties who provided you with the copies.

Do you see that, sir?

A. Yes.

Q. Isn't it true that Dastar didn't do that either, sir?

A. That's correct.

Q. Isn't it true, Mr. Andersen, that before this litigation was commenced, Dastar did not consult an attorney about the first cease and desist letter?

A. That's correct.

Q. Did Dastar at any time consult an attorney about the plaintiffs' claims of copyright infringement before this lawsuit was filed?

A. I don't believe so.

Q. Please turn to Exhibit 33, a letter dated July 29th, 1997, from Stephen Hebert, Dastar's controller, in response to the cease-and-desist letter. Do you see that, sir?

A. Yes.

Q. And is that the letter that Dastar sent back to the plaintiffs in response to Exhibit 32?

A. That's correct.

Q. Mr. Hebert sent that letter out with your approval, correct?

A. That's correct.

[40] Q. And Mr. Hebert is Dastar's controller and secretary, correct?

A. That is correct.

Q. Now, Exhibit 33 states, quote:

> We are in receipt of your joint letter dated July 15th, 1997. It is under review by our legal department.

Right?

A. Correct.

Q. Dastar didn't have a legal department in July 1997, did it?

A. Not directly, no.

Q. So that statement was false, wasn't it?

A. Well, that's up to interpretation what "legal department" means.

Q. Well, isn't it — let's turn back to your deposition at page 384, line 9.

A. (Witness complies.)

MS. CENDALI: (Reading:)

QUESTION: In July of 1999, (sic) 1998, did Dastar have a legal department?

ANSWER: An in-house legal department? Is that what you mean?

QUESTION: Yes.

ANSWER: No.

[41] QUESTION: Did EDI have a legal department?

ANSWER: No.

(End of reading deposition testimony.)

THE WITNESS: That's correct.

BY MS. CENDALI:

Q. Now prior to this lawsuit, Dastar never consulted a lawyer about Exhibit 33, did it?

A. That's correct.

Q. Now, Exhibit 33 goes on to state that Dastar has, quote:

> Halted the inclusion of our "Campaigns in Europe" and "Campaigns in the Pacific" in our retail account mix. We will maintain this position pending advice from our lawyers.

Do you see that, sir?

A. Yes.

Q. Now, Dastar did briefly halt "Campaigns"'s inclusion in its retail mix, right?

A. Correct.

Q. And Dastar did this by substituting another seven-volume video set it sells in the assortment that it sells customers, right?

A. That's correct.

Q. And all of Dastar seven-volume video sets are sold for the same price?

[42] A. Yes.

Q. And that price is approximately $25, correct?

A. That's correct.

Q. And a few weeks later, Dastar decided to return to including "Campaigns" in its retail account mix, correct?

A. That is correct.

Q. But despite what Dastar wrote in Exhibit 33 about omitting "Campaigns" from its retail account mix until receiving advice from its lawyers, Dastar did not consult with a lawyer before doing so, did it?

A. No, we did not.

Q. Now, Dastar made this decision on its own after receiving a document from the Library of Congress that the "Crusade in Europe" documentary was in the public domain, correct?

A. That is correct.

Q. And is Exhibit 34 the document that Dastar received from the Library of Congress on or about August 7th?

A. That is correct.

Q. But isn't it true that Exhibit 34 makes no mention of the copyright status of the book, "Crusade in Europe"?

A. That is correct.

Q. Now, turning back, if you would, again, to Exhibit 33, isn't it true that in that document Dastar requests that New Line, Fox and SFM provide it with the appropriate [43] documentation to support their assertion that they are the exclusive distributors of "Crusade"?

A. Correct.

Q. Now, let's turn to Exhibit 35.

A. (Witness complies.)

Q. Is Exhibit 35 a September 1997 letter from New Line responding to Dastar's letter Exhibit 33?

A. That is correct.

Q. Now, in Exhibit 35, New Line wrote back and said that plaintiffs were in the midst of gathering the information Dastar requested; and reiterated the request for Dastar to reveal where it got the dub for "Crusade in Europe," correct?

A. Yes.

Q. Dastar did not provide that information, did it?

A. Of course not.

Q. In fact, Dastar took no action after receiving Exhibit 35, correct?

MR. HYMAN: Objection, what is meant by "no action."

THE COURT: Sustained.

BY MS. CENDALI:

Q. Dastar didn't stop selling after it got Exhibit 35, did it?

A. No.

[44] Q. Let's turn to Exhibit 36.

A. (Witness complies.)

Q. Is that a letter from the plaintiffs to Mr. Hebert at Marathon Music & Video dated December 18, 1997?

A. Correct.

Q. And Exhibit 36 is the second cease-and-desist letter Dastar received regarding "Campaigns," isn't it?

A. Correct.

Q. Now, Mr. Andersen, isn't it true that you saw Exhibit 36, the letter dated December 18th, 1997, and its attachments shortly after the first of the year?

A. I don't believe that's correct. I saw this after the lawsuit was filed.

Q. Mr. Andersen, let's look at page 391 of your deposition transcript at line 24.

MR. HYMAN: If I could just have a second.

(Pause in the proceedings.)

MS. CENDALI: Are you there, Mr. Hyman?

MR. HYMAN: Yes.

MS. CENDALI: (Reading:)

QUESTION: Do you recall receiving this letter and its attachment on or about December 18, 1997?

ANSWER: Actually, I don't think I saw this letter until after the first of the year.

[45] (End of reading deposition testimony.)

BY MS. CENDALI:

Q. Now, in Exhibit 36, plaintiff supplied Dastar with the documents that Dastar requested supporting plaintiffs' claim to be the exclusive distributor of "Crusade," right?

MR. HYMAN: Objection as to — well, I'll withdraw the objection.

THE COURT: Okay.

THE WITNESS: Ask again, please.

BY MS. CENDALI:

Q. Isn't it true that in Exhibit 36 plaintiff supplied Dastar with the documents Dastar requested supporting plaintiffs' claim to be the exclusive distributor of "Crusade"?

A. I'll have to refresh my memory. Just a second. Yes. Related to both "Campaigns in Europe" and "Campaigns in the Pacific."

Q. The letter provided various letters confirming licenses and grants of rights; isn't that true?

A. Yes.

Q. Now, this second cease-and-desist letter, Exhibit 36, isn't it true that it expressly refers to the copyright of the book "Crusade in Europe"?

MR. HYMAN: Objection. The document speaks for itself, Your Honor.

[46] THE COURT: I'll allow the question.

THE WITNESS: Yes.

BY MS. CENDALI:

Q. And, in fact, isn't it true that the second cease-and-desist letter, Exhibit 36, attaches copies of the copyright registration and the renewal registration for the book "Crusade in Europe"?

MR. HYMAN: Objection. I think the document speaks for itself.

THE COURT: The document will be admitted into evidence and the court will examine it, but she is also entitled to ask the questions.

THE WITNESS: Yes, I believe it is.

BY MS. CENDALI:

Q. And you reviewed the attachments to that letter, didn't you, Mr. Andersen?

A. Yes.

Q. And isn't it true that nowhere in the letter do plaintiffs' claim to be relying on the copyright to the television series, "Crusade in Europe"?

A. I can't attest to that at all. I'd have to read it all over again.

THE COURT. We won't take the time to do it now.

THE WITNESS: Thank you.

BY MS. CENDALI:

[47] Q. Isn't it true, Mr. Andersen, don't you recall that this are no copyright registrations or renewals attached relating to the television series; just to the book?

MR. HYMAN: Objection, Your Honor. It would require the individual to go through the entire document.

MS. CENDALI: Only if you recall.

THE WITNESS: Ask it again.

BY MS. CENDALI:

Q. Isn't it true that the only copyright registrations attached relate to the book and not to the television series?

A. I believe that's true.

Q. Now, Mr. Andersen, isn't it true that Dastar never consulted a lawyer about Exhibit 36 until after this lawsuit was filed?

A. That's correct.

Q. Now, Exhibit 36, the second cease-and-desist letter, it reiterated the request for Dastar to stop selling "Campaigns," correct?

A. Yes, it did.

Q. And, in fact, on page 2 of the letter, the second sentence in the paragraph at the bottom of the page, it states:

> Again, we insist that you send New Line, Fox, SFM, HBO, and Time, Inc., written [48] confirmation of your client's compliance with the terms of our cease-and-desist letter.

Right?

A. Correct.

Q. Exhibit 36 also warned Dastar, didn't it, that if Dastar did not comply with the terms of the cease-and-desist letter, plaintiffs reserved their right to commence litigation, quote:

> To enjoin Marathon's infringing activity, disgorgement of all proceeds and materials, legal fees, punitive damages, and all other possible remedies.

Correct?

MR. HYMAN: Your Honor, I just object and would ask that the witness be allowed to see. If she could point to the portion of the document rather than have the witness try to search for it.

THE COURT: That would be helpful.

MS. CENDALI: Certainly.

A. Mr. Anderson, just continuing down in the paragraph that I just pointed you to. It then goes on to state:

> If we do not hear from you within ten business days of your receipt of the letter, we reserve the right to take all steps necessary to protect our interests, enforce our rights, and [49] exact the maximum punishment under the law including commencing appropriate legal action.

Do you see that, sir?

A. Yes, I do.

Q. But isn't it true, Mr. Andersen, that Dastar continued to sell the "Campaigns" even after receiving Plaintiff's Exhibit 36?

A. Yes, that's true.

Q. And isn't it true that Dastar never even responded to the second cease-and-desist letter, Exhibit 36?

A. That's correct.

Q. Now, Mr. Andersen, isn't it true that this lawsuit was filed by plaintiffs against Dastar on September 2nd, 1998?

A. I don't know the date. 1998.

Q. Would it be helpful if I showed you a file stamped copy of the lawsuit to refresh your recollection?

MR. HYMAN: Objection. I don't know if it would be helpful. The court can take judicial notice.

THE COURT: I can take judicial notice of the document.

MS. CENDALI: Thank you, Mr. Hyman, and Your Honor.

Q. Now, isn't it true, Mr. Andersen, that Dastar continued to sell "Campaigns" after this lawsuit was filed?

A. That is correct.

[50] Q. Now, isn't it true, Mr. Anderson, that after the lawsuit was filed Dastar contacted a copyright researcher named Eric Kulberg at a company called Universal Media to research the status of the copyright to the book, "Crusade in Europe"?

A. That's probably correct.

Q. And this was the first time, wasn't it, that Dastar made any effort to investigate the copyrights of the book "Crusade in Europe"?

A. That's correct.

Q. Now, please, if you would, take a look at Exhibit 37. Is that the report Dastar received from the copyright researcher it had retained?

A. That's correct.

Q. It's dated September 22nd, 1998, correct?

A. Correct.

Q. And that was a few weeks after this lawsuit was filed, right?

A. That's correct.

Q. Now, in that report, isn't it true at the bottom of the second paragraph, the last sentence, Mr. Kulberg, at Universal Media stated with regard to the book "Crusade in Europe," quote:

> It appears that Doubleday & Company has a solid copyright on that work and will hold it at [51] least until 2023.

Do you see that, sir?

A. Yes.

Q. And turning now to the second page of Exhibit 37, the second paragraph up from the bottom, the last sentence where it states:

> In any case, the underlying literary rights appear to be intact.

Do you see that, sir?

A. Yes.

Q. But isn't it true that Dastar continued to sell "Campaigns" after receiving Exhibit 37?

A. Correct.

Q. Please turn to Exhibit 40, Mr. Andersen. Is this a letter dated January 29, 1999, from Ronnie James, another of Dastar's copyright researchers?

A. Yes, it is.

Q. And attached to Mr. James' letter at the page in the handwritten notation pursuant to the Court Rules 40-2 is a page which states: "Crusade in Europe" head credit sequences. Do you see that?

MR. HYMAN: Excuse me. I object. Court Rules 40-2. I don't know if the witness understands that.

MS. CENDALI: Forgive me. I was referring to the practice and the local rules that we were to number the [52] exhibits consecutively. But just turn to page 2 of Exhibit 40.

THE WITNESS: Okay.

BY MS. CENDALI:

Q. And page 2 of Exhibit 40 says at the top: "Crusade in Europe" Television Series Head Credit Sequences. Correct?

A. Correct.

Q. And this was received by Dastar on or about January 29th of 1999, correct?

A. Correct.

Q. And did you understand these to be the credits for the television series "Crusade in Europe"?

A. No, because I never really paid any attention to the detail in this.

Q. Well, let's look at — turn to page 425 of your transcript. Starting at line 2.

QUESTION: Was this document supplied to you by Mr. James?

ANSWER: I believe so.

QUESTION: And did you understand these to be the credits for "Crusade in Europe," the television series?

ANSWER: Yes.

(End of reading deposition testimony.)

MR. HYMAN: I'd like the next question and answer [53] read, please.

THE COURT: All right.

MS. CENDALI: (Reading:)

QUESTION: And these were the credits that were deleted in the making of "Campaigns in Europe"; is that right?

ANSWER: I don't know that.

QUESTION: They don't appear in "Campaigns in Europe," though, right?

ANSWER: These don't.

(End of reading deposition testimony.)

BY MS. CENDALI:

Q. Now, it is true, then that none of the credits reflected in Exhibit 40 appear in "Campaigns," do they?

A. That's correct.

Q. Isn't it true, Mr. Andersen, that in March of 1999, Dastar manufactured nearly another 1,000 video sets of "Campaigns in Europe"?

A. That's correct.

Q. And this was after the lawsuit was filed, correct?

A. That is correct.

Q. And this was after Dastar received the document containing the credits for the television series "Crusade in Europe," correct?

A. That's correct.

[54] Q. And the new copies that Dastar made of "Campaigns in Europe" continued to omit any credits for anyone but Dastar, right?

A. That's correct.

Q. Isn't it also, true, Mr. Andersen, that as a result of this lawsuit, Dastar has never made any effort to recall "Campaigns in Europe" from its customers?

A. That's correct.

Q. And, in fact, despite this lawsuit Dastar continues to sell "Campaigns," right?

MR. HYMAN: Objection. It has been asked and answered.

THE COURT: Sustained.

BY MS. CENDALI:

Q. Now, Mr. Andersen, you are aware, aren't you, that this court rendered its summary judgment decision holding Dastar liable for infringement on January 6, 2000?

A. Yes.

Q. And Dastar learned of this court's decision on or about that time, correct?

A. I didn't learn until a little later than that. Late in the month.

Q. Isn't it true, Mr. Andersen, that despite this court's ruling on liability, Dastar still continued to sell "Campaigns"?

[55] A. That's correct.

Q. In fact, isn't it true, Mr. Andersen, that on Monday of this week, Dastar produced documents showing that it continued to sell "Campaigns" right through July of 2000?

A. I can't tell you that we sold them. We shipped some, but I can't tell you they were sales.

Q. Well, let's take a look at Exhibit 61-A, the document that we got on Monday.

A. (Witness complies.)

Q. That shows an outbound order in July, correct, sir?

A. It could have been replacements for defectives.

Q. Mr. Andersen, what are Dastar's approximate net assets?

A. Approximately $10 million.

* * *

[82] Exhibit No. 3, which is the plaintiff's video set, six-volume video set. Do you have that in front of you?

A. Yes.

Q. And have you seen this before, the box in the set?

A. Yes.

Q. When was the first time you had in your possession Exhibit No. 3, the box with the videos in it?

A. After the lawsuit was filed.

Q. How did you get it?

A. We ordered it from a mail-order company.

Q. How much did you pay?

A. I believe it was $99 plus handling, shipping.

Q. When you examined it on the bottom, did you notice any copyright notice?

A. Yes. There is a 1993 New Line Home Video sold exclusively by Columbia Tristar Home Video.

* * *

* * * [88]Mr. Andersen, I would like, if you would, please, to go to Exhibit 26.

A. (Witness complies.)

Q. Do you have Exhibit 26 in front of you?

[89] A. Yes, I do.

Q. What is it?

A. It's a purchase order to Rose City Label from Entertainment Distributing for oval stickers. It's a "Crusade in Europe" and "Crusade in the Pacific."

Q. And when did EDI order these stickers?

A. The end of July, 1997. In January, I mean, 1997.

Q. January of 1997? And why did you order these stickers?

A. Well, it had come to my attention by my national sales manager that there was — I couldn't tell you where or what — but copies of "Crusade in Europe" out for sale at various accounts around the country.

Q. When did it come to your attention?

A. January of '97.

Q. How did it come to your attention?

A. My sales manager informed me.

Q. Before that time, were you aware of any videos called "Crusade in Europe" or "Crusade in the Pacific"?

A. Yes.

Q. When?

A. "Crusade in Europe" back some point in '95. "Crusade in the Pacific," I had not seen any at that time.

Q. Why did you undertake to have these stickers made?

A. Well, my feeling was that if somebody had purchased "Crusade in Europe" already from some other source, [90] different customers, mail-order, that if they purchased our package, that the possibility of a lot of the same footage being in it, that they might not be happy. So I was willing to help the consumer out and provide the information to avoid an unhappy customer.

Q. Now, it says — page 2 of Exhibit 26. Do you see that?

A. Yes.

Q. And what's that?

A. That's a copy of the text that appeared on the sticker.

Q. And it says "Contains Film Footage from the Previously Released 'Crusade in Europe'". What did you do with the 5,000 stickers?

A. Applied them to approximately 5,000 sets over the course of a few months.

Q. And did you order any more stickers?

A. No, we did not.

Q. Why not?

A. Well, basically, my people said: Why are we doing this? We haven't had any complaints. Nobody has called us. It's a waste of time and a waste of money. So we stopped doing it.

* * *

[103] Q. Would you look at schedule 100-7, please.

A. (Witness complies.)

Q. Do you have that in front of you?

A. Yes.

Q. Have you seen that before?

A. Yes.

Q. Item No. 4 says: Total units sold. What is that number?

A. 35,566.

Q. Do you know what that number consists of?

A. Yes. Schedule 61-1-A and 100-1 combined.

Q. What does that number represent?

A. Total net sales of units for "Campaigns in Europe."

Q. From when to when?

A. From the inception to July, 2000.

* * *

[114] Q. What consideration, if any, Mr. Andersen, when Dastar received Exhibit 32 as to whether it was violating state unfair competition law?

A. None. No consideration.

Q. Now, you also testified, I believe, that you thought that there was nothing left of the book in "Campaigns" after you took out the title and the references to the book; is that right?

A. That's correct.

Q. But you kept all the narration from "Crusade in Europe," didn't you?

A. Yes. Well, not all of it, no.

MR. HYMAN: Objection as to foundation.

MS. CENDALI: This witness has already testified on Mr. Hyman's exam that he has done this comparison, et cetera.

THE COURT: Well, the question that he kept the narration. I'm not sure that the evidence is clear as to who made the editing decisions so I'll sustain the objection.

BY MS. CENDALI:

Q. Mr. Andersen, you are aware, aren't you, that there isn't a line of narration in "Campaigns in Europe" that did not come from "Crusade in Europe"'s video, the "Crusade in Europe" documentary?

[115] MR. HYMAN: Could we have that read back, please.

(Record read.)

MR. HYMAN: Well, objection. It says "Crusade in Europe" video, "Crusade in Europe" documentary. I object to that as ambiguous. We're talking about the 26 television episodes.

THE COURT: You want to restate it?

MS. CENDALI: I attempted to clarify my question. I will now.

Q. Mr. Andersen, isn't it true that there isn't a line of narration in Dastar's "Campaigns in Europe" video set that did not come from the documentary television series "Crusade in Europe"?

A. You'll have to be more explicit than that.

Q. Are you aware of any narration whatsoever matching the footage that is in the package that you sold, "Campaigns in Europe," that Dastar wrote itself?

A. No.

Q. And isn't it also true that the only images that Dastar included new in the "Campaigns in Europe" video set it sold were images of the credits, the chapter titles, and eventually the couple of minute wraparounds that it had Dale Reed do?

A. What was the question?

MS. CENDALI: Could we read it back, please.

[116] (Record read.)

THE WITNESS: That is correct.

* * *

* * * [124] DIRECT EXAMINATION

BY MS. CENDALI:

Q. Good morning, Mr. Tarter.

[125] A. Good morning, counselor.

Q. Mr. Tarter, you're a full-time employee of Dastar, correct?

A. Correct.

Q. Now, Dastar, the company you work for, is one of the defendants in this action, right?

A. Correct.

Q. You understand that I represent the plaintiffs in this action?

A. Yes, ma'am.

Q. Now, Mr. Tarter, your current title is director of video acquisitions at Dastar, correct?

A. Yes.

Q. In that capacity, you are in charge of the video division, right?

A. Yes.

Q. And as the person in charge of Dastar's video division, you are responsible for acquiring video product, assisting with graphics for the product, and then turning it over to Dastar sales department, right?

MR. HYMAN: Objection as to relevance as to his activities.

THE COURT: It's just foundational. Overruled.

THE WITNESS: Would you repeat some of that?

MS. CENDALI: Sure.

[126] Q. Your responsibilities include acquiring video product, assisting with graphics for the product and then turning the product over to Dastar sales department, right?

A. That's correct.

Q. You don't have any marketing role with the company, correct?

A. Correct.

Q. Now, isn't it true that most of the video product that comes out of Dastar's video division is based on archival footage?

A. That is correct.

Q. Now, as head of Dastar's video division, you report directly to Mr. Norman Andersen, the president of Dastar, correct?

A. That is correct.

Q. And isn't it true that you've known Mr. Andersen, your boss and the president of Dastar, for approximately 25 years?

A. That is correct, also.

Q. And you consider him a friend of yours, right?

A. Yes.

Q. Isn't it true that you approached Mr. Andersen in 1995 about Dastar's possibly getting involved in the video business?

A. It was mutual conversation, yes.

[127] Q. You had been a freelance video producer for about twelve years before you and Mr. Andersen spoke about Dastar getting into the video business, right?

A. We spoke quite a few times about going into the business, yes.

Q. It's true, prior to 1995, you had been a freelance video producer for about twelve years, right?

A. That is correct.

Q. And in roughly 1995, you and Mr. Andersen began discussing the expansion of Dastar from music CDs to videos, right?

A. Yes.

Q. And you also discussed possible specific video projects that the two of you might undertake, correct?

A. Correct.

Q. And one of the possible video projects you and he discussed related to the television series "Crusade in Europe," right?

A. Correct.

Q. You and he were both familiar with the series "Crusade in Europe" because you had both watched it on television when you were youths, correct?

MR. HYMAN: Objection as to Mr. Tarter's foundation as being able to state what Mr. Andersen felt.

THE COURT: Mr. Andersen testified to it and I'm [128] sure if they spoke to each other, he can testify to that as well.

THE WITNESS: Yes, we both reminisced about the 50s show.

BY MS. CENDALI:

Q. And isn't it true, Mr. Tarter, that you told Mr. Andersen that one of the reasons you were interested in the series "Crusade in Europe" was that based on your experience you knew that war sells?

A. That is true.

Q. Isn't it also true, Mr. Tarter, that when you first saw the "Crusade in Europe" series on television as a youth, you were aware that it was based on General Eisenhower's book "Crusade in Europe"?

A. Yes.

Q. In fact, you knew it was based on General Eisenhower's book because each episode of the "Crusade in Europe" series began by showing General Eisenhower and a portion of his book, right?

A. That is correct.

Q. So you were also aware in 1995, prior to Dastar's release of "Campaigns in Europe," that the "Crusade in Europe" series was based on General Eisenhower's book "Crusade in Europe," right?

A. Yes.

[129] Q. But before Dastar released "Campaigns in Europe," isn't it true that you never checked on the copyright status of General Eisenhower's book?

A. On the book specifically, no.

Q. Instead, you just checked on the copyright status of the "Crusade in Europe" television series, right?

A. That is correct.

Q. Please turn to Exhibit 41 in the rather thick binder in front of you?

A. (Witness complies.)

Q. Is that an excerpt from a book you own called *Film Super List*?

A. That's a couple of pages from *Film Super List*, that's correct.

Q. Is this part of what you used to check the copyright status of the "Crusade in Europe" series?

A. That is correct.

* * *

* * * [132] Q. Prior to the release of "Campaign," did you ever consult an attorney about whether Dastar's use of the "Crusade" series would infringe on anyone's rights?

A. No, ma'am.

Q. And am I correct that prior to the release of "Campaigns," you never consulted an attorney as to the copyright status of General Eisenhower's book, "Crusade in Europe"?

A. That is correct.

Q. Now let's turn to the subject of credits. You claim that the master recordings of the "Crusade in Europe" series [133] that Dastar duplicated did not have any credits on them, right?

A. Yes, ma'am.

Q. Now, do you recall that I took your deposition last July in Eugene, Oregon?

A. Yes, ma'am.

Q. Now, isn't it true that at that deposition I asked you if Dastar still had the master recordings of the "Crusade" series that it used to make the "Campaigns"?

MR. HYMAN: Objection, Your Honor, of what — I think it's an improper question to ask this witness as to what he was asked. If she has a question —

THE COURT: I think we can treat it as foundational. I think she was just getting into the general subject.

THE WITNESS: Could you repeat it, please.

BY MS. CENDALI:

Q. Isn't it true that at your deposition I asked you if Dastar still had the master recordings of the "Crusade" series that it used to make "Campaigns"?

A. You did ask that question.

Q. You answered, didn't you, that Dastar didn't have them and didn't know who did?

A. That's correct.

Q. And later in your deposition I asked you if the masters [134] could have been sent to L.A. Video Grams, right?

A. Yes.

Q. And you replied that you didn't remember, right?

A. Okay.

Q. Now, after your deposition, you had the opportunity to read it and make any corrections, correct?

A. That is correct.

Q. But isn't it true that it wasn't until Tuesday of this week did you send in a correction to your deposition stating that Dastar had, in fact, sent the dubs to L.A. Video Grams, right?

A. No. I made my corrections as soon as I got the deposition approximately ten months ago or eleven months ago.

Q. So it's news to you that we only got them yesterday, right?

A. That is correct.

Q. Now, isn't it true that I specifically asked Dastar to produce the master recordings it used to create "Campaign"?

MR. HYMAN: Objection as to what this — the attorney asked Dastar as to what this witness would know about that.

THE COURT: You can answer if you know.

THE WITNESS: I don't know about you asking Dastar.

[135] MS. CENDALI: Let me try a different question.

Q. Isn't it true that at your deposition, when you were sitting there, I specifically called for the production of the master recordings Dastar used?

A. Yes, you did.

Q. But the master recordings were never produced, were they?

A. No.

Q. Let's please turn to Exhibit 40.

A. (Witness complies.)

Q. Is this a document dated January 29, 1999, that you received from Ronnie James, proprietor of the original film library?

A. Correct.

Q. And Mr. James is one of Dastar's copyright researchers, right?

A. That is correct.

Q. And am I correct that you asked Mr. James to provide you with information that led to him sending you this letter?

A. You are correct.

Q. Now, Exhibit 40 contains a list of the credits for the "Crusade in Europe" series, doesn't it?

A. Yes, it does.

Q. And you got Exhibit 40 on or about January 29th of [136] 1999, right?

A. January, yes, on or about, yes.

Q. So even if, as you claim, there were no credits on the "Crusade" master tapes you used for "Campaign," you could have gotten a complete list of the credits from Mr. James at anytime including prior to Dastar's release of "Campaigns" in 1995?

MR. HYMAN: Well, objection. Calls for speculation as to what he could have done or what Mr. James could have provided.

THE COURT: I don't know how long your relationship was with Mr. James or what you've used him for or when. But I think you can answer that question based on your experience.

THE WITNESS: My experience says that the films that I examined didn't have any credits. I don't know why I would have called him about other credits when there were no credits on the films that I had.

BY MS. CENDALI:

Q. Mr. Tarter, isn't it true that there was publicly available information that you could have accessed in 1995, if you wanted to, to ascertain the credits for the "Crusade in Europe" series?

A. That is correct.

Q. Now, let's turn back for a minute to Exhibit 41, the [137] excerpt from the book you used to check the copyright status of the series.

A. (Witness complies.)

Q. It identifies the copyright holder for the "Crusade" series as Twentieth Century Fox Film Corporation, doesn't it?

A. Yes, it does.

Q. So your own book that you used in 1995 to research the copyright status of the series shows you that Fox was involved with the "Crusade" series, right?

A. Yes, it does.

Q. And that would have also been a clue as to what credits to include, correct?

A. If I were looking for credits, it would be, yes.

Q. But you weren't looking for credits, right?

A. That's true.

Q. Now let's turn to Exhibit 6.

A. (Witness complies.)

Q. Is Exhibit 6 the list of credits included in Dastar's "Campaigns in Europe" series?

A. Yes, it is.

Q. You drafted the credits for "Campaigns" as shown on this list, didn't you?

A. Yes, I did.

Q. And the people you listed on the credit list are the [138] only people given any credit for creating and producing "Campaigns," right?

A. That is correct.

Q. And isn't it true that the only people you included on that list are you, your boss Norman Andersen, and your assistant Barbara Kaye?

A. I included Barbara Kaye who was my assistant, my future boss Norman B. Andersen and myself, that is correct.

Q. But, Mr. Tarter, you weren't involved in the creation of the "Crusade in Europe" series, were you?

A. No, I wasn't.

Q. And to your knowledge, neither Mr. Andersen nor Miss Kaye was involved in the creation of the "Crusade" series, were they?

A. Not the original series, no.

Q. And you knew at the time that you created these credits that neither you, nor Mr. Andersen, nor Miss Kaye were involved in creating the "Crusade" series when you drafted these credits?

A. Creating the original shows? No, ma'am.

Q. Please turn to Exhibit 8.

A. (Witness complies.)

Q. Are these the credits that are used on each video in the "Crusade in Europe" video series, Exhibit 3?

A. I don't have any idea.

[139] Q. Did you ever look at Exhibit 3, the "Crusade in Europe" video series?

A. Yes, I did.

Q. Was that after your deposition?

A. That's correct.

Q. Am I correct, though, Mr. Tarter, that none of the entities and individuals listed on Exhibit 8, the credit list, are listed in Dastar's credits for "Campaigns in Europe"?

A. That is correct.

Q. So isn't it true, Mr. Tarter, that no one viewing Dastar's "Campaigns in Europe" would have any reason to know that any of the individuals listed in Exhibit 8 were involved in creating your distributing "Crusade in Europe"?

MR. HYMAN: Objection, Your Honor, as to what when? Are we talking about "Crusade in Europe" the video or are we talking about "Crusade in Europe" the TV shows again?

BY MS. CENDALI:

Q. No one would have any idea they were involved in either the video or the series, correct?

MR. HYMAN: I object, Your Honor, as to who these credits are referring to. I want to just be clear that referring to these credits on Exhibit 8, are we referring to the "Crusade in Europe" TV shows or are we referring to the "Crusade in Europe" videos?

[140] THE COURT: I think there is a foundational problem because my understanding is the witness was shown Exhibit 8 and he didn't seem to know what it was. So I don't know how he can testify as to what its significance is. Maybe I missed an answer but I didn't hear it.

MR. HYMAN: My objection also was assumes facts not in evidence that these individuals were involved in any way at all in the television series.

THE COURT: Sustained.

BY MS. CENDALI:

Q. Mr. Tarter, isn't it true that there is nothing in Dastar's "Campaigns in Europe" that would tell viewers that "Campaigns in Europe" was derived from "Crusade in Europe"?

MR. HYMAN: Again, Your Honor, objection. Are we talking about the television series?

MS. CENDALI: I will ask it both ways, Your Honor.

Q. Isn't it true that there is nothing in Dastar's "Campaigns in Europe" that would tell its viewers that "Campaigns" was derived from the television series "Crusade in Europe"?

A. That is true.

Q. And isn't it also true, Mr. Tarter, that there is nothing in Dastar's "Campaigns in Europe" that would tell viewers that it was derived from General Eisenhower's book "Crusade in Europe"?

[141] A. That is true, also.

Q. And there is certainly nothing in Dastar's "Campaigns in Europe" that references the video series "Crusade in Europe," correct?

MR. HYMAN: Well, objection as to — I'll withdraw the objection.

THE WITNESS: There is no reference to the video series. That's correct.

BY MS. CENDALI:

Q. Mr. Tarter, isn't it, in fact, true that you and Mr. Andersen decided to delete all references to General Eisenhower's book in "Campaigns in Europe"?

A. We decided to take out all material that would interfere with the flow of the product; and that particular segment did interfere, in my estimation, so we did delete all reference to the book, the covers and a few other things.

Q. So I am correct, then, you did decide to delete all references from the book from "Campaigns in Europe," correct?

A. You are correct.

Q. And, in fact, didn't you actually delete the General Eisenhower — in fact, didn't you actually delete the image of General Eisenhower's book from "Campaigns" in at least 26 places at the beginning of the series and before each [142] chapter title?

A. That is correct.

Q. And isn't it true that you Mr. Andersen decided to delete all references to General Eisenhower's book in order to eliminate any possible stumbling block as to the creation of a new product?

A. Are you quoting me with those fingers in "stumbling block"?

MS. CENDALI: I was intending to, sir.

THE WITNESS: I thought you were. Yes.

BY MS. CENDALI:

Q. And you also made a decision to delete any references to the "Crusade" television series, right?

MR. HYMAN: Objection. That assumes that there was a reference to the television series.

THE WITNESS: Could you restate, please.

THE COURT: Yes, please.

MS. CENDALI: Okay.

Q. Let me ask it another way. Isn't it true that you wanted to put distance between "Campaigns in Europe" and the "Crusades" television series?

A. No. That never came up.

Q. Turning to your deposition —

A. Do I have that here?

Q. Yes, you should. Page 86.

[143] MR. HYMAN: Your Honor, let me lodge one with the court here. May I approach to assist the court?

THE COURT: Do you have a copy for the witness?

MR. HYMAN: Yes.

THE COURT: I can give it to him.

MR. HYMAN: I'll give him the extra copy. Thank you very much.

THE WITNESS: I have the deposition.

MS. CENDALI: Okay.

Q. At your deposition on page 86, line 17, I asked you the question:

QUESTION: Would you agree that the other titles that you mentioned such as "Victory World War II" are less similar to "Crusade in Europe" than "Campaigns in Europe"?

And then there is an objection; and then on page 87, line 1:

ANSWER: We would — I was never conscious of putting any connection to "Crusade in Europe." If anything, I was looking to put distance from the television show because we were making a brand new production.

(End of reading deposition testimony.)

Do you see that?

A. Yes.

[144] Q. So you were trying to put distance between the "Crusade" show, correct?

A. From my testimony, yes.

Q. You wanted to make "Campaign" look like it was a brand new product, didn't you?

A. That is true.

Q. In fact, you wanted to make "Campaigns in Europe" appear all new even though you knew that it contained hours of footage taken from "Crusade in Europe," right?

A. That is correct.

Q. Now, it's true, isn't it, Mr. Tarter, that you were aware that the original "Crusade in Europe" television series had credits to people other than yourself, Mr. Andersen, and Miss Kaye?

A. Was I aware? No. I assumed they had but I can't state for a fact that they did.

Q. Most things have credits, right?

MR. HYMAN: Pardon?

BY MS. CENDALI:

Q. Isn't it true that in your experience as a video producer most finished video products contain credits?

A. That is correct.

* * *

[159] Q. Well, when you said — that's not a good question. Let me ask this question. When you said it was your intention to remove all references to the book, what were you removing when you thought you were removing all references to the book?

A. I was removing the on-camera, on-film references to the book. The actual book, the pictures, the highlighting of the pages, that's what I was removing.

* * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS DATED AUGUST 10, 2000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HON. FLORENCE-MARIE COOPER,
JUDGE PRESIDING

No. CV-98-7189-FMC(Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, and NEW LINE HOME VIDEO, INC., a New York corporation,

Plaintiffs,

vs.

DASTAR CORPORATION, an Oregon corporation, ENTERTAINMENT DISTRIBUTING, an Oregon corporation, and MARATHON MUSIC & VIDEO, an Oregon corporation,

Defendants.

* * *

(Commencing at page 209)

Q. Isn't it true that your only basis you had for what General Eisenhower's thoughts were were from the copy you made of the "Crusade in Europe" series?

A. Isn't it true — I don't quite get what you're asking me.

Q. Why did you put — why did you title Volume 7 of the "Campaigns in Europe" video set that Dastar sold "Eisenhower's Thoughts"?

A. After examining the master I had, that appeared to be a very appropriate title for that video.

Q. Thank you, Mr. Tarter.

Now, Mr. Tarter, you claim that —

A. Whoops.

Q. — that "Campaigns" is a new and different work from [210] the "Crusades" series, right?

A. Yes, ma'am.

Q. But isn't it true that the only things Dastar added to the "Crusade" masters were, one, new chapter titles which you added after you deleted the image of General Eisenhower's book; two, a couple of minutes of introductory wraparounds on the title sequence; three, a couple of minutes of music and radio clips that played with your titles and; four, credits to yourself and others at Dastar?

A. You are describing what we added, that is correct, plus our graphic — four-color, three-dimensional graphic.

Q. And the graphic, you mean is the thing that says "Campaigns in Europe" at the beginning, right?

A. That's correct.

Q. Now, with respect to the chapter titles, "Campaigns" had 26 chapter titles, right?

A. Yes, ma'am.

Q. And "Crusade" has 26 chapter titles, right?

A. Yes, ma'am.

Q. And isn't it true in selecting the chapter titles for "Campaigns" you just retitled the chapter titles from "Crusade"?

A. That is correct.

MR. HYMAN: Objection. What is meant by "retitling"?

[211] THE COURT: Overruled.

THE WITNESS: That's correct.

BY MS. CENDALI:

Q. So, for example, the chapter title of "Campaigns," "Footsteps to War," corresponds to the chapter title in "Crusades," "Prelude to War"; is that correct?

A. That is correct.

Q. And "Campaigns's" "Wake Up America" is "Crusades's" "America's Unpreparedness"?

A. That's correct.

Q. And "Let's Go USA" in "Campaigns" is "Crusades's" "America Goes to War"?

A. Yes.

THE COURT: We have enough.

MS. CENDALI: You get the idea.

Q. Am I correct that the chapter title sequences, that you testified that Dastar added, last for only approximately ten seconds?

A. I believe that's correct.

Q. So with 26 chapter title sequences, that is approximately 260 seconds total, right?

A. For that particular segment, yes.

Q. So the new chapter title sequences that you added last for a total of approximately four minutes and 20 seconds?

A. On a reel roll, yes.

[212] Q. And the music and radio clips you talked about that played at the same time, that's part of the four minutes, 20 seconds?

A. Yes, ma'am.

Q. Now, turn to Exhibit 23 in your other binder which is the script that you wrote. I believe you testified that you wrote the wraparound that Dale Reed narrated.

A. Yes. I have it in front of me.

Q. And just to confirm, Dale Reed is not a military historian, correct?

A. No. He's an ex-marine.

Q. More recently, isn't he a retired Oregon radio personality?

A. That is correct.

Q. But you wrote the script for Mr. Reed's introductions, right?

A. Yes, I did.

Q. And isn't it true that Dale Reed's scripts consist of nothing more than one paragraph that he repeated verbatim at the beginning of each "Campaigns" volume and then one shorter paragraph that was specific to each volume?

A. I wrote it in one paragraph, but it certainly was more than one paragraph's work.

Q. Well, you prepared Exhibit 23, didn't you, sir?

A. Originally, yes.

[213] Q. Yeah.

Q. And you wrote it as eight paragraphs, right?

A. That's how you write a script. It's different from a letter or a book.

MR. HYMAN: Your Honor, I would say the document pretty much speaks for itself on the content and what it is.

THE COURT: I agree, yes.

BY MS. CENDALI:

Q. And the only words, then, that Dastar added to "Campaigns" were in the wraprounds, correct?

A. That's correct.

Q. Isn't it true that the wraprounds simply introduced the viewer to what the rest of the videotape is going to be?

A. Absolutely.

Q. And isn't it true that when Dastar originally released "Campaigns" in October of 1995, "Campaigns" didn't have these wraprounds?

A. That is correct.

Q. The wraprounds were added or weren't filmed until approximately September of 1996, correct?

A. That is correct.

Q. Now, Dastar didn't destroy any of the inventory it might have had on hand with the previous version of "Campaigns" before it did the wraprounds, did it?

A. It's not my area. I don't know.

[214] Q. But you never heard that they did that, right?

A. That's correct.

Q. And isn't it true that to your knowledge Dastar never produced any documents showing how many copies of "Campaigns" it sold before the wraparounds were added as compared to after the wraprounds were added?

MR. HYMAN: Objection as to foundation.

THE COURT: Sustained.

MS. CENDALI: Counsel, will you stipulate that Dastar never produced any documents indicating how many units were sold prior to adding the wraprounds?

MR. HYMAN: No. I can't stipulate to that.

MS. CENDALI: Okay. We will deal with that in closing argument, then.

Q. So all of the narration in "Campaigns" came from "Crusade" then, right?

MR. HYMAN: Objection. Argumentative.

THE COURT: Overruled.

Other than the narration and the wraprounds?

MS. CENDALI: Yes.

THE WITNESS: Other than that, yes, that's correct. Thank you, Your Honor.

BY MS. CENDALI:

Q. All of the music in "Campaigns" that accompanies everything but the chapter titles came from "Crusade"?

[215] A. Right. What little there was, yes.

Q. And other than moving the "Crusade" series recap from the end to the beginning of "Campaigns," you didn't make any other changes to the sequence or order of the footage, right?

A. No. That was the chronological order of the war so I didn't touch it.

MS. CENDALI: I think the evidence speaks for itself on that.

MR. HYMAN: Objection, Your Honor. This is not time for argument.

MS. CENDALI: It's also not time for — then move to strike for nonresponsiveness.

THE COURT: The latter portion of the answer is stricken.

BY MS. CENDALI:

Q. Now, Mr. Tarter, when I questioned you yesterday and asked you if you had deleted references to the "Crusade" series, there was a foundation objection and I withdrew the question. Do you remember that?

A. No.

Q. Well, Mr. Tarter, you testified yesterday in response to Mr. Hyman's questioning that the copy of the "Crusade" series that you arranged for Dastar to duplicate had the original opening logo of the TV show, right?

[216] A. It had the logo the "Crusades in Europe" that we just saw, yes.

Q. That was the logo from the TV show, right?

A. Yes.

Q. So that was in reference to the "Crusade" television series, right?

A. Yes, ma'am.

Q. And you deleted it, right?

A. Yes, ma'am.

Q. Now, Mr. Tarter, you also testified yesterday that you included a special thanks to the U.S. National Archives in "Campaigns."

A. Yes.

Q. But isn't it true, Mr. Tarter, that Dastar never got any footage from the National Archives to create "Campaigns"? Everything it got came from the "Crusades" series?

A. That is correct.

Q. Isn't it true, Mr. Tarter, that by putting in the special thanks for the National Archives, Dastar was trying to create the false impression, just like it did when it included a 1995 copyright notice, that Dastar had created the work itself?

MR. HYMAN: Objection, Your Honor. That's argumentative. It is also duplicative.

[217] THE COURT: Overruled.

You may answer.

THE WITNESS: That was not my intention, no.

BY MS. CENDALI:

Q. I'd like you to look, if you would, at Exhibit 41 which Mr. Hyman questioned you about yesterday.

A. Yes, ma'am.

Q. Now, Exhibit 41 is an excerpt taken from Exhibit 56 which is the physical copy of the book entitled "Film Superlist, Motion Pictures in the U.S. Public Domain, 1950 to 1959"; is that right?

A. That is correct.

Q. You testified yesterday when Mr. Hyman questioned you that you relied on the "Superlist" book in concluding that the "Crusade" series was in the public domain and you could copy it?

A. That's correct.

Q. In fact, didn't you say that you concluded that you could copy this "Crusade" series because there was an "N" by the title "Crusade in Europe," in Exhibit 41, which meant the copyright wasn't renewed?

A. Correct.

Q. Am I correct, Mr. Tarter, that you've relied on the Superlist book in other circumstances in working with Dastar as to whether to proceed with video projects?

[218] MR. HYMAN: Objection. Relevance.

THE COURT: Overruled.

THE WITNESS: I have used the book extensively.

BY MS. CENDALI:

Q. So you used it many times, not just working for Dastar, but prior to that in your career as a film producer; is that right?

A. Yes.

Q. And is it fair to say that the Superlist book has been important to you in your work?

A. Yes.

MS. CENDALI: Your Honor, may I approach and hand the witness a physical copy of the book, Exhibit 56?

THE COURT: Sure.

MS. CENDALI: Your Honor, because the binders we all prepared only have a place saver for the physical copy, it would facilitate the examination if I could hand up to the court and to Mr. Hyman additional excerpts from the book since we only have one copy of the physical. Is that all right?

THE COURT: That's fine.

MS. CENDALI: Thank you very much.

Your Honor, we have taken the liberty of three-hole punching them in case you wish to put them in the binder.

[219] THE COURT: Okay.

BY MS. CENDALI:

Q. I'd like you, Mr. Tarter, to turn to page IV of the book. Do you see that?

A. Yes, ma'am.

Q. Now, a quarter down the page, do you see the word "Warning"?

A. Yes.

Q. It's in bold print, isn't it?

A. That's correct.

Q. And there is an exclamation point after it, right?

A. Yes, ma'am.

Q. And it's double-scored, right? Two lines under the word "Warning"?

A. Yes, ma'am.

Q. And underneath the word "Warning" is a list of fifteen items, correct?

A. That is right.

Q. Please take a look at warning item No. 4. Am I correct that this warning state's, quote:

> Films may be covered by underlying copyrights, books, plays, et cetera.

Is that correct?

A. That is correct.

Q. Going down to warning item No. 12. Am I correct that [220] it states, quote:

> A motion picture is a bundle of rights. This book concerns just one of those rights, the presence or absence of copyright of the film for the renewal period. Learn about other rights. Unquote.

Do you see that, sir?

A. Yes, ma'am.

Q. Isn't it true that these warnings put you on notice, Mr. Tarter, that you should investigate the copyright status of a film's underlying work before copying it?

MR. HYMAN: Objection, Your Honor. I'll let it stand. Excuse me. I withdraw the objection.

THE WITNESS: It certainly says that.

BY MS. CENDALI:

Q. Please turn to page 512 of Exhibit 56.

A. (Witness complies.)

Q. The page numbers are at the bottom, several pages in. I'd like you to look at the right-hand column at the top where it says "potential problems." Do you see that heading?

A. Yes, I do.

Q. I'd like to read from that column beginning where it says "problem one" right under those five lines of stars, horizontal stars. It says, quote:

> [221] An underlying copyright first in time may be a book. Second in time may be a motion picture. Third in time may be a copyright renewal of the book. Fourth in time may be the last day of the period during which the motion picture copyright may be renewed. Possibly the copyright was not renewed for the motion picture. The owner of the copyright on the book can sue the public domainer who first uses the — who uses the public domain film.

Do you see that, sir?

A. Yes, ma'am.

Q. And then the problem then concludes, quote:

> "Superlist" never indicates whether the copyright in the underlying work was renewed.

Do you see that, sir?

A. Yes, ma'am.

Q. Do you see how "underlying" is underlined?

A. Yes, ma'am.

Q. Isn't it true, Mr. Tarter, that the potential problem section of your book, Exhibit 56, puts you on notice that you should investigate the copyright status of the film's underlying work before copying it or risk being sued?

A. That's what it states.

Q. Let's turn to page 513 of Exhibit 56. Please take a [222] look at the left-hand column. Do you see the heading entitled "Communications From Readers"?

A. Yes, ma'am.

Q. I'd like you to read right below that where it says Communication No. 1. Quote:

> "Film Superlist shows no renewal of copyright in the film. I have received a notice from a publisher who claims that he owns the underlying copyright in the short story.

Then it goes on to give the author of the book, Mr. Hurst's, reaction. Quote:

> I checked with the copyright office and found the short story's copyright and renewal. I obtained a photocopy of the short story from a Washington private search service which copied it from a magazine in the Library of Congress. I compared the short story and the film and found they were similar. I recommended that the film not be used.

Do you see that, sir?

A. Yes, ma'am.

Q. Isn't it true that Communication No. 1 in your book, Exhibit 56, puts you on notice that you should investigate the copyright status of the film's underlying work before copying it?

[223] A. It does state that.

Q. Now, let's look at Communication No. 2 on that same page. I'm going to read it. Quote:

> "Film Superlist shows no renewal of the film. I have received a letter from a company which claims ownership of the copyright in the film. I checked with the copyright office and was told that the film copyright was not renewed.

Then it goes on to give Mr. Hurst's reaction. Quote:

> Please send me a copy of the letter from "The Enemy" and a copy of the copyright office report. When I read the letter from "The Enemy," I noted that "The Enemy" did not claim a copyright in the film. "The Enemy" claimed a copyright in the music in the film. The title of the music was the same as the title of the film. I checked with the copyright office, learned that the copyright in music had been renewed. I recommended that the film not be used.

Do you see that, sir?

A. Yes, ma'am.

Q. And isn't it true that Communication No. 2 in the book you relied on, Exhibit 56, puts you on notice that you should investigate the copyright status of the film's [224] underlying work before copying it?

A. It so states that, yes.

Q. Now, let's take a look at the bottom of page 513 in Exhibit 56. Now, on the right-hand side of that page towards the bottom is the Section titled: 5, Aggressor Two Faced. Do you see that?

A. Yes, ma'am.

Q. And that section continues, does it not, on to page 514 at the top left?

A. Yes.

Q. I'd like to read the paragraph at the top left-hand column of the page. Quote:

> A motion picture producer sued a public domainer for using a public domain film. The motion picture producer claimed the film infringed on the copyright of an underlying work, the script. The judge ruled in favor of the public domainer.

Do you see that, sir?

A. Yes, ma'am.

Q. Isn't it true that this paragraph in your book, Exhibit 56, puts you on notice that you should investigate the copyright status of the film's underlying work before copying it?

A. Yes.

[225] Q. Let's turn to page 517 in Exhibit 56. Do you see on the left-hand side of the page there is a heading called "Underlying Copyright"?

A. Yes, ma'am.

Q. I'd like to read the two paragraphs right under that title. Quote:

> A telephone caller called me — excuse me — a telephone caller thanked me for the time I had given him. He said: You said that sometimes a public domain film is based on a copyright protected book. Do I only have to worry about the underlying copyrights when they are books?
>
> I replied: You have to worry about underlying copyrights whether they are books or plays or short stories or poems or comics or cartoons or motion pictures or music or any kind of copyright protected work.

Do you see that, sir?

A. Yes, ma'am.

Q. Isn't it true that the underlying copyright section in your book, Exhibit 56, puts you on notice that you should investigate the copyright status of the film's underlying work before copying it?

A. Yes, ma'am.

MR. HYMAN: Your Honor, I believe that has been [226] asked and answered.

THE COURT: Yes.

BY MS. CENDALI:

Q. Turning to the last excerpt from your book that you relied on, Exhibit 56, the page II. It's the second page of the excerpts.

Your Honor, that I handed up. I'd like to —

THE COURT: You don't want to read the one that "sometimes judges are predictable"?

(Laughter.)

MR. HYMAN: Save it for argument.

THE COURT: Save it for argument. So what page are you turning to?

MS. CENDALI: To page 2, Your Honor, the second italicized paragraph at the top.

THE COURT: Okay.

MS. CENDALI: Your Honor may take judicial notice, however, of the other section.

THE WITNESS: Is that II?

MS. CENDALI: Yes.

Q. II in the "Film Superlist" book towards the beginning of the book, it says, doesn't it, quote:

> This publication is designed to provide accurate and authoritative information —

MR. HYMAN: I'm sorry. Is it II, the second page?

[227] MS. CENDALI: I meant of what I had handed up, sir.

MR. HYMAN: 56-A-II?

MS. CENDALI: Yes.

MR. HYMAN: Would you please tell me where you started at.

MS. CENDALI: Certainly. It's the second italicized —

MR. HYMAN: I'm sorry. I missed it. Thank you.

THE WITNESS: Could you give me the page number?

MS. CENDALI: Sure. It's II.

THE WITNESS: Got it.

BY MS. CENDALI:

Q. And then, again —

A. Which one?

Q. II, the second full paragraph, starts with: This publication and it's in italics. Are you with me, Mr. Tarter?

A. We are now.

Q. And it says, quote:

> This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other [228] professional advice. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Do you see that, sir?

A. Yes, ma'am.

Q. Isn't it true that Dastar didn't follow the book's suggestion and seek legal advice before copying the "Crusades" series?

MR. HYMAN: Objection. I think it's argumentative.

THE COURT: Asked and answered several times so I'll sustain the objection.

BY MS. CENDALI:

Q. Mr. Tarter, given all the warnings in this book, Exhibit 56, isn't it true that Dastar was reckless in not checking the copyrights status of the underlying book "Crusade in Europe" before copying the "Crusade" series?

A. Reckless? No.

MS. CENDALI: No further questions.

* * *

[261] **CROSS-EXAMINATION**

BY MS. CENDALI:

Q. You've testified, Mr. Andersen, that you didn't include [262] the credits to plaintiffs on "Campaigns in Europe" because you felt you needed the permission of plaintiffs to do that; is that right?

A. Correct.

Q. You made no effort to ask for permission, did you?

A. No, I didn't.

Q. And you claim you didn't understand when you read Exhibit 32, the first cease-and-desist letter, that the reference to unfair competition was a complaint about the credits; is that correct?

A. Correct.

Q. You certainly could have written and asked plaintiffs to clarify that point; isn't that true?

MR. HYMAN: Objection. I think that's argumentative.

THE COURT: I'll sustain it.

BY MS. CENDALI:

Q. Mr. Andersen, you were sued for reverse passing off under the Lanham Act and you certainly understood at that time that plaintiffs were complaining about the credits, right?

MR. HYMAN: Objection. I guess, again, since there has been such a strong objection to the attorney-client accomplice privilege. I'm happy to waive the privilege, if he's asked what he understood based upon [263] his attorneys, go ahead.

THE COURT: All right.

BY MS. CENDALI:

Q. Did you ever read the Complaint?

A. Yes.

Q. When you read the Complaint did you see that we were complaining about the credits? Did that become known to you at some point in time that the plaintiffs were complaining about the credits?

A. Yes.

Q. But isn't it true, even after that knowledge became known to you, Dastar still kept selling "Campaigns" without the credits?

A. Correct.

Q. Now, Mr. Hyman asked you some questions relating to Exhibit 61, basically trying to make the point that the sales in Christmas of 1998 weren't as good as the sales in Christmas of 1996 or 1995. Do you remember that, sir?

A. I don't believe those were the years but and —

Q. What do you recall?

A. I don't recall. Refresh me, then.

Q. Okay. Am I correct that Mr. Hyman was asking you some questions in his examination of comparing the sales figures of the Christmas season following the filing of the lawsuit in September of 1998 to sales figures in preceding years [264] during that time of the year?

A. I believe that's what he asked.

Q. Now, Mr. Andersen, isn't it true the first year a video is released is typically it's biggest selling year?

A. I have no knowledge of that.

Q. So despite being in the video business, you have no knowledge of the fact that when you release a video product that first year, the product is released when it's brand new and available to consumers is the year that most people want to buy it?

MR. HYMAN: Objection as argumentative.

THE COURT: Overruled.

THE WITNESS: You're asking my opinion?

BY MS. CENDALI:

Q. I'm asking your experience.

A. In theatrical, I would agree with you. In our experience, sales increase as time goes on.

Q. Okay. Isn't it true, Mr. Andersen, that in electing to copy the "Crusade" series, you testified and felt — you specifically thought it would be a good seller because 1995 was the 50th anniversary of the end of the war.

A. Correct.

Q. And, in fact, isn't it true that in 1995 there was a lot of media attention given to the end of the war?

A. Correct.

[265] Q. There were specials on prime time television, "The Return to Normandy," correct?

A. Correct.

Q. There was a lot of media attention about General Eisenhower's decision to invade Normandy and how that was accomplished, correct?

MR. HYMAN: Objection as to foundation.

THE COURT: Overruled.

You may answer.

THE WITNESS: I have no idea about General Eisenhower's specific — if you want to talk about the Allies' decision to invade Normandy, I would agree.

BY MS. CENDALI:

Q. So you felt, didn't you, that releasing "Campaigns in Europe" in 1995 was a great window of opportunity for the company to make money based on the fact that it was the war's 50th anniversary?

A. That is correct.

Q. And it's now five years past the end of the war, correct?

A. Correct.

Q. So it's not surprising that at this point that sales would have gone down, is it, sir?

A. Our sales have not gone down. Are you referring to "Campaigns in Europe"?

[266] Q. That's what I'm referring to.

A. Yes. Obviously, the sales have gone down.

Q. Okay. Now, turning just briefly to the wraparound for a minute. Am I correct that Dastar did not destroy any inventory of copies of "Campaigns in Europe" that it may have created prior to instituting the wraparound?

A. That's correct.

Q. So if Dastar had any inventory of the prewraparound version, it would have just kept selling them until it was done, right?

A. If we had any inventory, we would have.

Q. And Dastar never produced, to your knowledge, any documents showing how many copies of "Campaigns in Europe" it sold prior to the couple-of-minute wraprounds, right?

MR. HYMAN: Objection. Argumentative.

THE COURT: Overruled.

THE WITNESS: Ask the question again, please.

BY MS. CENDALI:

Q. Am I correct, sir, that you're not aware that Dastar produced any documents indicating how many units of "Campaigns in Europe" it sold prior to the inclusion of the wraparound?

A. I'm not aware of any documents.

Q. Am I also correct that Dastar never produced any documents showing the relative percentages of sales of audio [267] CD products versus their video products?

A. Ask that again, please.

Q. Am I correct that Dastar, to your knowledge, never produced any documents showing the relative percentage of sales of their audio products as opposed to their video products?

A. I am not aware of it.

MR. HYMAN: Objection. It presumes there was a request for such documents.

THE COURT: I'll leave the answer it.

THE WITNESS: I'm not aware of it.

BY MS. CENDALI:

Q. Mr. Andersen, what is the approximate retail price of "Campaigns in Europe"?

A. We don't set the retail. But I can tell you what some of our customers retail it for.

Q. What is that?

A. 26.99, 27.99.

Q. And is the right — does the price vary over time and by customer?

A. It can.

Q. Now, I believe at one point, in response to one of Mr. Hyman's questions, you testified that you received threatening letters from plaintiffs without any documentation. Is that correct?

[268] A. That's correct.

Q. Was it your testimony, Mr. Andersen, that Plaintiff's Exhibit 36, the second cease-and-desist letter, does not contain any documentation?

MR. HYMAN: Objection; argumentative.

THE COURT: This is cross-examination. Argumentative is not a valid objection.

MR. HYMAN: Okay. Thank you, Your Honor.

THE WITNESS: What was the question again?

BY MS. CENDALI:

Q. Is it your testimony that Plaintiff's Exhibit 36, the second cease-and-desist letter, does not contain any supporting documentation?

A. Not that I considered valid.

Q. So you just decided that none of that was valid, right?

A. That's correct.

Q. Why?

A. Well, you want an example?

Q. Sure. I'd love one.

A. One letter is: To whom it may concern. A letter from a company vice president on his own stationery telling us that he had these rights.

Now, what makes that valid? Excuse me. Anybody can write that.

MS. CENDALI: Well, the document is in evidence so [269] Your Honor can make up her own decision on that.

Q. Now, you've testified, Mr. Andersen, that Dastar gets to choose what's in the retail mix it sends its customers, right?

A. That's correct.

Q. And you also testified that Dastar ships products within three days of getting an order, right?

A. Generally.

Q. And you say you didn't learn of this court's summary judgment decision dated January 6th until the end of January, correct?

A. Correct.

Q. I assume — excuse me — am I correct, Mr. Andersen, that Mr. Hebert, the secretary or controller or the company's national sales manager you mentioned yesterday, might have been in the office in early January available to get a phone call to hear that Dastar had been found liable for infringement?

A. A phone call from who?

Q. Your counsel. From anybody.

A. Oh, I assume that he could have been, of course.

Q. So turning to Exhibit 61-1-A, do you have it, Mr. Andersen?

A. Yes.

Q. Doesn't that exhibit show that in February, March, June [270] and July of 2000, Dastar chose to include "Campaigns in Europe" in its retail mix to its customers?

A. That's not correct.

Q. Isn't that what the document says, sir?

A. No, it doesn't.

Q. Why?

A. It says that we shipped some product, "Campaigns in Europe." It doesn't say we chose to include it in a mix and it doesn't show the customer's names.

Q. Isn't it true that Exhibit 61-1-A shows that Dastar made sales of "Campaigns in Europe" in February, March, June and July of this year?

A. They may not have been sales. They may have been replacements for defective product. I think I already testified to that.

Q. Do you have any documents that say that these were anything other than sales?

A. Well, not with me.

* * * *

JUDGMENT CONCERNING CLAIMS ASSERTED BY AND AGAINST PLAINTIFFS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 98-7189 FMC (Ex)

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, and NEW LINE HOME VIDEO, INC., a New York corporation,

Plaintiffs,

v.

DASTAR CORPORATION, an Oregon corporation, ENTERTAINMENT DISTRIBUTING, an Oregon corporation, and MARATHON MUSIC & VIDEO, an Oregon corporation,

Defendants.

DASTAR CORP., an Oregon corporation,

Counterclaimant

v.

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, SFM ENTERTAINMENT LLC, a Delaware limited liability company, NEW LINE HOME VIDEO, INC., a New York corporation, and DOUBLEDAY, a division of BANTAM DOUBLEDAY DELL PUBLISHING GROUP, INC., a corporation,

Counterdefendants.

JUDGMENT CONCERNING CLAIMS ASSERTED BY AND AGAINST PLAINTIFFS

WHEREAS, on September 2, 1998, plaintiffs Twentieth Century Fox Film Corporation, SFM Entertainment LLC, and New Line Home Video, Inc. ("plaintiffs") filed a complaint for copyright infringement against defendants Dastar Corp., Entertainment Distributing, and Marathon Music & Video ("defendants");

WHEREAS, on March 29, 1999, plaintiffs filed a first amended complaint, adding claims for Lanham Act infringement and violation of California unfair competition law;

WHEREAS, on May 28, 1999, defendants filed counterclaims for declaratory relief, intentional misrepresentation, negligent misrepresentation, unfair competition, and slander of title;

WHEREAS, on June 28, 1999, defendants filed a notice of dismissal of their counterclaims for intentional and negligent misrepresentation with prejudice;

WHEREAS, on July 6, 1999, the Court granted plaintiffs' motion to dismiss defendants' counterclaim for slander of title with prejudice and without leave to amend;

WHEREAS, on January 6, 2000, the Court granted plaintiffs' motion for summary adjudication of issues, holding that defendants violated the Copyright Act, Lanham Act, and California unfair competition law, and that defendants' remaining counterclaims for declaratory relief and unfair competition were without merit;

WHEREAS, on August 9-11, 2000, the Court conducted a bench trial concerning the remedies for defendants' infringement of plaintiffs' intellectual property rights;

WHEREAS, on August 30, 2000, the Court issued its Findings of Fact and Conclusions of Law, holding that

defendants' violation of the Copyright and Lanham Acts was willful and that plaintiffs are entitled to (1) an award of $150,000 in statutory damages or $783,606.83 as defendants' profits under the Copyright Act, (2) an award of $1,567,213.66 ($783,606.83 as defendants' profits, doubled) under the Lanham Act, and (3) injunctive relief under the Copyright Act, Lanham Act, and California unfair competition law;

THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Defendants shall pay plaintiffs the amount of $1,717,213.66 ($150,000 in statutory damages under the Copyright Act and $1,567,213.66 under the Lanham Act) plus post-judgment interest at the legal rate until paid;

2. Plaintiffs may file a motion for attorneys' fees and costs; if the Court grants such motion, this Judgment shall be amended to reflect the amount of plaintiffs' award;

3. Defendants are permanently enjoined from manufacturing, copying, duplicating, selling, renting, marketing, leasing, distributing, or otherwise disposing of any videocassettes that use elements of original subject matter contained in the book *Crusade in Europe* (the "Book"), including its text, structure, format, contents, sequencing, organization and tone;

4. Within 30 days of entry of Judgment, defendants shall deliver and surrender to plaintiffs all negatives, positive film prints, transcriptions, recordings, video masters and videocassettes in their possession, custody, or control that infringe on or that may have been used to infringe plaintiffs' rights under the copyrights to the Book;

5. Defendants are permanently enjoined from taking credit for and passing off *Campaigns in Europe* as their own creation;

6. Within 30 days of entry of Judgment, defendants shall file with the Court and serve on plaintiffs a report in writing, under oath, setting forth in detail the manner and form in which defendants have complied with the foregoing injunction;

7. Defendants shall take nothing, and their counter-claims against plaintiffs for declaratory relief, intentional misrepresentation, negligent misrepresentation, unfair competition, and slander of title are dismissed on the merits and with prejudice, as are all of defendants' affirmative defenses; and

8. The Court shall retain jurisdiction to enforce this Judgment and injunction.

Dated: Sept. 11, 2000 s/ Florence-Marie Cooper
HON. FLORENCE-MARIE COOPER
UNITED STATES DISTRICT JUDGE

EXCERPTS FROM APPELLEES' ANSWERING BRIEF

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Appeal Nos. 00-56703, 00-56712

TWENTIETH CENTURY FOX FILM CORPORATION, SFM ENTERTAINMENT LLC, and NEW LINE HOME VIDEO, INC.,

Plaintiffs-Counter-Defendants/Appellees

v.

DASTAR CORPORATION,

Defendant-Counter-Claimant/Appellant

ENTERTAINMENT DISTRIBUTING and MARATHON MUSIC & VIDEO,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, HON. FLORENCE-MARIE COOPER, JUDGE

Case No. CV-98-07189-FMC

APPELLEES' ANSWERING BRIEF

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* * *

JURISDICTIONAL STATEMENT

Plaintiffs agree with defendants' jurisdictional statement.

STATEMENT OF THE CASE

On September 2, 1998, plaintiffs sued defendants for copyright infringement, alleging defendants' sale of copies of plaintiffs' *Crusade in Europe* videos ("Videos"), as *Campaigns in Europe*, infringed plaintiffs' exclusive right to distribute videos based upon General Eisenhower's still-copyrighted *Crusade in Europe* book ("Book"). (SER:1-118.) On October 2, defendants answered without demanding a jury. (SER:119-128.)

Plaintiffs' March 29, 1999 amended complaint alleged additional "reverse passing off" and unfair competition claims, based on defendants' falsely taking credit for "creating" the Videos. (ER:1-111.) On May 28, defendants filed a first amended answer and counterclaims for intentional

misrepresentation, negligent misrepresentation, unfair competition and slander of title. Defendants also sought a declaration that the Book is in the public domain and cancellation of its copyright. (ER:112-242.)

After plaintiffs moved to dismiss all counterclaims, defendants dismissed their intentional and negligent misrepresentation counterclaims with prejudice. (SER:129-32.) On July 6, the Court dismissed with prejudice defendants' slander of title and declaratory relief counterclaims related to the cancellation of the Book's copyright, and denied plaintiffs' motion to dismiss the remaining declaratory relief and unfair competition counterclaims. (SER:133-158.)

On October 22, defendants filed a motion for summary judgment. (SER:159-165.) On November 8, plaintiffs filed a cross-motion for summary adjudication on all claims and on defendants' remaining counterclaims. (SER:302-307.) The Court's January 4, 2000 opinion granted plaintiffs' motion and denied defendants'. First, the Court held that, as a matter of law, defendants infringed plaintiffs' exclusive license to the Book because (1) it was uncontroverted that "Eisenhower wrote the [B]ook . . . at the 'instance and expense' of Doubleday" and Doubleday "had the right to supervise" Eisenhower's writing and, thus, Doubleday properly renewed the Book's copyright as proprietor of a work-for-hire, and (2) defendants admitted copying footage containing "significant portions of the Book" to create *Campaigns*. (ER:2104-08.)

Second, the Court held that defendants violated the Lanham Act and unfair competition law. Applying this Circuit's "reverse passing off" test, it concluded that uncontroverted evidence showed defendants: (1) "bodily appropriat[ed]" plaintiffs' work, having "admit[ted] that they copied the entire *Crusade in Europe* series to create *Campaigns*," except for "minor changes," and (2) falsely

identified themselves as *Campaigns'* sole producers, when others created, restored and/or distributed the work. (ER:2108-11.) On July 20, defendants' motion for reconsideration was denied. (SER:548-52.)

On June 23, the Court granted plaintiffs' motion to strike defendants' jury demand in the first amended answer. (SER:543-47.) Beginning August 9, the Court conducted a bench trial on remedies. On August 29, the Court held that defendants willfully violated the Copyright and Lanham Acts and plaintiffs were entitled to (1) $150,000 in statutory damages *or* $783,606 as defendants' profits under the Copyright Act,[1] (2) $1,567,213.66 under the Lanham Act ($783,606.83 in profits, doubled under 15 U.S.C. § 1117(a)), and (3) injunctive relief. (ER:2887-90.)

To avoid double-counting profits under the Copyright and Lanham Acts, plaintiffs elected statutory copyright damages. Accordingly, the Court entered judgment for $1,717,213.66 ($150,000 under the Copyright Act and $1,567,213.66 under the Lanham Act). (ER:2889.)

* * *

II. THE COURT PROPERLY CONCLUDED THAT DEFENDANTS WERE LIABLE UNDER THE LANHAM ACT

Reverse passing off occurs when one takes "another party's product and sells [it] under a name chosen by the wrongdoer," rather than the name of those who earned the designation. *Smith v. Montero*, 648 F.2d 602, 605 (9th Cir. 1981). To establish reverse passing off in *this* Circuit,

[1] The Court calculated defendants' profits by deducting $91,244.35 in documented costs from *Campaigns'* $874,851.18 gross revenues. (ER:2871-73.) The Court excluded additional evidence of expenses produced just before trial. (SER:2876.)

plaintiffs must prove (1) "bodily appropriation" of and (2) "misattribution" of credit for plaintiffs' work. *Cleary v. News Corp.*, 30 F.3d 1255, 1260-61 (9th Cir. 1994). Defendants cite the *Second* Circuit's four-part reverse passing off test and contend that plaintiffs were unable to adduce evidence supporting the elements. (AOB:36-45.) As described below, defendants' sale of *Campaigns*, a repackaged, near-verbatim copy of the Videos, under defendants' names, satisfied *this* Circuit's standard for reverse passing off.

A. *Campaigns* Bodily Appropriated The Videos

This Circuit defines bodily appropriation as the "'copying or unauthorized use of substantially the entire item.'" *Cleary*, 30 F.3d at 1261. The Court correctly concluded that defendants' copying of the Series to "create" *Campaigns* satisfied this test.[20] Defendants admitted that they took the Series' entire footage, narration and music and made *only* the following minor changes: (1) substituted a new

[20] Citing the Court's statement that it "misunderstood" trial testimony concerning *Campaigns'* origin, defendants imply the Court would have ruled differently on liability had it understood defendants duplicated the Series, not the Videos. (AOB:18,38.) The Court merely referred to the fact it misunderstood Andersen as testifying as such, *not* that it believed that *Campaigns* was made from the Videos. (ER:2437-38) Whatever the court's understanding at trial, its summary judgment decision is replete with references to *Campaigns* being copied from the Series. (ER:2086-2113.) Regardless, whether defendants' pirated the Series or Videos has no bearing on liability. Misattribution is the *sine qua non* of reverse passing off, *Cleary*, 30 F.3d at 1260, and it was uncontroverted that defendants falsely identified themselves as *Campaigns'* producers and concealed *Campaigns* was another's work product. *Summit Machine v. Victor CNC Systems*, 7 F.3d 1434, 1437-38 (9th Cir. 1993) (analyzing differences between parties' products under bodily appropriation test although defendants' product created by third-party rather than copied from plaintiffs'). Furthermore, bodily appropriation of the Series necessitated bodily appropriation of the Videos because their contents are the same. (ER:500.)

opening title sequence, credit page, and final closing credits; (2) substituted new introductory chapter titles corresponding to the 26 in the Series and Videos; (3) deleted footage showing the Book's image; and (4) moved the Series' "recap" to *Campaigns'* beginning, re-titling it as a "preview."[21] (ER:1603-05,1596-99,1610,1663-67.) Defendants did nothing else to alter the Series. (ER:1641,1607-10.) Other than these insubstantial changes, most of which served to credit defendants, *Campaigns' entire* content as released in October 1995 — narration, film footage (including content and organization) and music — was taken from the Series. Because the summary judgment record was uncontroverted that the Videos are a "direct reproduction" of the Series (ER:500),[22] *Campaigns* is a bodily appropriation not only of the Series, but also the Videos.

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[21] Defendants' citation to *Selby v. New Line Cinema*, 96 F.Supp.2d 1053(C.D.Cal. 2000) for the proposition that plaintiffs' purported failure to "compare the two multiple-hour tape sets . . . created an insufficient record" (AOB:40) to analyze "bodily appropriation" is a red herring. In *Selby*, defendants attached copies of two screenplays to a *motion to dismiss* and "urge[d] the Court to examine [them] and determine" that there was no bodily appropriation. *Id.* at 1056. The court denied defendants' motion, concluding (1) plaintiff "adequately allege[d] that defendants violated the Lanham Act by bodily appropriating his work," and (2) it was "premature to engage in a factual comparison of the screenplays at this early stage in the proceedings." *Id.* Here, it would have been superfluous for plaintiffs to compare the Videos and *Campaigns* segment-by-segment because, unlike *Selby*, defendants admitted to the near-identity of *Campaigns* and the Series (and, thus, the Videos).

[22] For the first time on appeal, defendants allege that the Videos "had a running time . . . substantially shorter than the 26 half-hour films." (AOB:16.) However, there was no evidence controverting that the Videos are a "direct reproduction" of the Series (ER:500). Defendants rely on the Series being referred as comprising 26 "half-hour" episodes; however, defendants conceded the episodes were shorter than 30 minutes. (ER:2517.) Regardless, the relevant issue is whether *Campaigns* is a bodily appropriation of the Videos.

(Cont'd)

Defendants contend that the Court applied a "relaxed standard of similarity" in lieu of bodily appropriation by ignoring alleged differences between the Videos and *Campaigns*. (AOB:40-41.) Without record citations, defendants assert *Campaigns* "contained substantial additional words vis-à-vis the *Crusade* videos" and "over two dozen deletions." (AOB:40.) However, defendants conceded that the *only* "deletions" were of Book images at the beginning of each Series chapter,[23] and the *only* "additions" were new credits, title and chapter sequences.[24] (ER:1603-05,1597-99,1607-10.) Because the Lanham Act precludes taking credit for another's work, defendants cannot avoid "bodily appropriation" by relying on *the very changes that mask plaintiffs' contribution* and falsely make *Campaigns* seem like a new product.[25]

(Cont'd)

Comparing the two sets (*and* defendants' admission to the limited changes made in creating *Campaigns*) shows that it is. (ER:1596-99,1607-10,1663-67.)

[23] A comparison of *Campaigns* and the Videos reveals that deletions of the Book's image and changes in credits and chapter titles account for the purported videos' difference in running-time. (AOB:19).

[24] Defendants' contention that "[e]ven the common footage appeared in radically different order" (AOB:19) is belied by their admission that the *only* sequence change made to Series footage and narration was moving the "recap." (ER:1610) The remainder of the footage and narration in *Campaigns* is virtually identical to the Videos'. (ER:1663-67.)

[25] For the same reason, any purported differences in the packaging or "external characteristics" of *Campaigns* and the Videos (AOB:18,39-41) cannot create a genuine issue as to defendants' bodily appropriation. Creating new packaging was another means by which defendants furthered their misattribution of credit and concealed that they did not produce the content contained therein.

Defendants' reliance on *Cleary* (AOB:40) is misplaced. In *Cleary,* the defendants made "significant" and "major changes" to the plaintiffs' work, including "14 important areas of revision" that "reversed or altered" plaintiffs' prior edition. *Cleary*, 30 F.3d at 1262. The changes were so significant that "helpful lists of changes, corresponding page numbers, and other notes about the new edition" were distributed. *Id.* In contrast, defendants' minor revisions in creating *Campaigns,* which disguise *Campaigns'* true origin, are, as the Court concluded, "insufficient to avoid liability under the Lanham Act." (ER:2110.) *Id.* at 1261-62 ("claim cannot be lawfully defeated by . . . sprinkling of a few neat sentences here and there or the making of trivial deletions"); *Summit*, 7 F.3d at 1437 (defendants may "be guilty of reverse palming off by selling . . . another's product that has been modified slightly"). Therefore, the Court applied the proper standard and correctly held that defendants bodily appropriated the Series (and thus plaintiffs' Videos).

B. Defendants Falsely Took Credit For Plaintiffs' Product

The Court also properly concluded that defendants misattributed credit for *Campaigns*. While they admitted copying the *entire* Series, *Campaigns'* only credits are for defendants, not plaintiffs. (ER: 1663-67, 1601-08, 1641-42.) Thus, *Campaigns* conceals that virtually all of its seven hours was produced by others.

Defendants contend "it was disputed whether defendants falsely designated the origin of the *Crusade* videos and TV series" because they allegedly did not "remove or obliterate credits" to create *Campaigns*. (AOB:38.) However, whether defendants removed plaintiffs' credits is not material because the Lanham Act applies to "any false designation of origin." 15 U.S.C. § 1125(a). No statutory requirement exists that a true designation of origin be removed, nor does case law require it. While some decisions refer to removal of credits

because that is how infringers frequently pass off another's goods as their own, this Circuit focuses on *whether* there was misattribution, *not* the *manner* in which it was done. Thus, in *Summit*, after referring to removal of credits as one way of violating the Act, the court states that "'[a] defendant may *also* be guilty of reverse . . . [passing] off by selling or offering for sale another's product that has been slightly modified and then relabeled with a different name." *Summit*, 7 F.3d at 1437 (court proceeded with bodily appropriation analysis although no credits removed).[26] *See Lamothe v. Atlantic Recording,* 847, F.2d 1403, 1405, 1407 (9th Cir. 1988) (composers stated reverse passing off claim arising from co-author listing only himself as songwriter although defendants did not photocopy songs and remove co-authors' names).

If only removal of credits could give rise to a reverse passing off claim, anyone could avoid liability for replicating and taking credit for an unsigned painting or sculpture. That would contradict the Act's policy of ensuring consumers "know the true source of [a] product." *Smith*, 648 F.2d at 607.

Thus, the relevant question is whether the offending work's attribution is *false*. The Court correctly concluded it was. Defendants *knew* that virtually all of *Campaigns*, except their minor changes concealing its origin, was created by others, yet they identified only themselves as *Campaigns'* source. (ER: 1597-99, 1601-05, 1608-10, 1641, 1663-67.)

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[26] Defendants cite only the *concurring* opinion in *Summit,* which stresses that, unlike here, the infringer did not represent that it manufactured or designed plaintiffs' product, and *Florentine Art Studio v. Vedet K.*, 891 F. Supp. 532, 540 (C.D. Cal. 1995). (AOB:38-39.) Both opinions conclusorily refer to credits removal; neither analyzes reverse passing off requirements *or* policies underlying the Act.

C. Plaintiffs Had Standing

Defendants contend that the Court also erred because there allegedly was insufficient evidence that plaintiffs were "creator[s]" of the Videos. (AOB:37-38.) Defendants take too narrow a view of this Circuit's test for standing in reverse passing off cases.

"On its face, section 43(a) gives standing to sue to 'any person who believes that he is or is likely to be damaged.'" *Smith*, 648 F.2d at 607. Thus, the "dispositive question is whether the party has a reasonable interest to be protected from false advertising." *Lamothe*, 847 F.2d at 1405. It was uncontroverted that plaintiffs have such an interest. As defendants concede, "Fox 'participated in the creative process' for the TV Series" (AOB:38), having conceived, financed and overseen its production, and contracted with Doubleday for Book rights. (ER:1990-92,1328-53.) Because the Videos directly reproduce the Series (ER:500), Fox *is* the source of their content. SFM originated the idea of restoring and making the Series available to modern audiences, spearheaded finding the films, and supervised their restoration and repackaging.[27] (ER:496-500, 503-70.) (Thus, Fox and SFM *were* the Video's "creators" and have standing under defendants' standard.) New Line distributes the Videos.[28] (ER:498-500,532-55,568-70.) All plaintiffs are identified in the Videos' credits, all should be associated with the Book and Series on video, and all have an interest in

[27] Defendants argue SFM did not exist until after the Videos were created. (AOB:38.) However, the SFM entity that produced the Videos is a predecessor of plaintiff SFM. (ER:496.)

[28] While defendants contend the Court "erred in finding it undisputed that '[p]laintiffs are the producers' of the Crusade [V]ideos" (AOB:38), the Court concluded that plaintiffs "are the producers *and sellers*" of the Videos. (ER:2109.)

preventing defendants from misattributing *Campaigns'* true source.[29]

D. This Circuit Does Not Require Proof Of Confusion For Reverse Passing Off

Relying on *Second* Circuit authority, defendants contend the Court erred in failing to consider whether plaintiffs adduced evidence of confusion.[30] (AOB: 36-37, 41-45) However, *this* Circuit does not require an independent showing of confusion to establish reverse passing off. Indeed, both Circuits recognize that they have different reverse passing off requirements.

This Circuit "has established a rigorous test for proving 'reverse passing off' under the Lanham Act. . . . [as] there must be bodily appropriation." *Cleary*, 30 F.3d at 1261. Confusion is assumed when there is bodily appropriation because such a finding requires "copying or unauthorized use of substantially the entire item." *Id.* at 1261-1262. *See Waldman Publishing v. Landoll*, 43 F.3d 775, 784 (2nd Cir. 1994) ("the Ninth Circuit has held that in the context of reverse passing off, consumer confusion is caused only by the false designation of works that are 'bodily appropriations' of the originals").

Conversely, to determine reverse passing off, the Second Circuit applies "a less demanding 'consumer confusion' standard," *Cleary*, 30 F.3d at 1262, a "substantial similarity" test. *Waldman*, 43 F.3d at 783. Thus, under the Second

[29] *Meta-Film v. MCA*, 586 F.Supp. 1346, 1363 (C.D. Cal. 1984) is inapposite because it is not a Lanham Act case; plaintiffs there had no connection with defendants' film.

[30] Aside from its lack of merit, this argument should not be considered because defendants first raise it on appeal. *Animal Protection Institute v. Hodel*, 860 F.2d 920, 927 (9th Cir. 1988) (failure to raise issue below bars consideration on appeal). Defendants neither argued nor developed the record below concerning confusion.

Circuit's test, confusion is not assumed but must be shown because "substantially similar" works may so differ as to not give rise to confusion. *Id.* at 784 (defendant's work can be substantially similar to without bodily appropriating plaintiff's); *Cleary*, 30 F.3d at 1261-62 (more lenient standard does not ensure likelihood of consumer confusion).

Reflecting this Circuit's more "rigorous" bodily appropriation test subsumes the "less demanding 'consumer confusion' standard . . . employed by the Second Circuit," *id.* at 1261, 1262, no Ninth Circuit reverse passing off case has required an independent showing of confusion apart from bodily appropriation. Nor would creating an additional confusion requirement make sense. If someone has taken virtually all of someone else's work and mislabeled it as their own, confusion regarding the work's true source is assured. Therefore, defendants' contentions that the Court failed to consider the "eight nonexclusive 'likelihood of consumer confusion' factors,"[31] and inferred confusion from a "deficient record" are meritless. Once the Court found bodily appropriation, an additional confusion analysis would have been superfluous.

E. Defendants' Misattribution Harmed Plaintiffs

Defendants' assertion that plaintiffs failed to prove harm from defendants' reversing passing off, thereby "mandat[ing] reversal," lacks merit.[32] (AOB:44.) Again relying on *Second*

[31] Defendants cite *Waits v. Frito-Lay*, 978 F.2d 1093, 1109-10 n.9, 1110-11 (9th Cir. 1992), *cert denied*, 506 U.S. 1080 (1993) for the proposition that the eight-part test for confusion "appl[ies] in credit removal cases." (AOB:42.) However, *Waits* is a false endorsement *not* reverse passing off case. *Id.* at 1106. Because a finding of bodily appropriation is not required to prove false endorsement, *Waits* is inapplicable as to whether a separate finding of confusion is necessary here.

[32] By failing to raise this argument in opposing plaintiffs' summary judgment motion, defendants are barred from raising it on appeal. (*Supra*, p.50, n.30.)

Circuit authority, defendants contend "[a]bsent evidence of harm there can be no reverse passing off." (AOB:44.) However, no Ninth Circuit case has held that a showing of harm is required — in addition to bodily appropriation and misattribution — for reverse passing off.[33]

Even if proof of harm *were* required, plaintiffs met their burden. Plaintiffs' harm flows from the uncontroverted evidence that defendants sold what was essentially the Videos, yet credited only themselves for the work.[34] Since the Series was "well received," "successful," and was based upon a critically acclaimed Book by a war hero (ER: 326, 342, 459-87, 1992), plaintiffs would have benefited from being associated with and viewed as responsible for the Videos' release. As this Court explained:

> [I]n reverse passing off cases, the originator of the misidentified product is involuntarily deprived of the advertising value of its name and of the goodwill that otherwise would stem from public knowledge of the true source of the satisfactory product.

Smith, 648 F.2d at 607. In this case, each plaintiff lost unquantifiable valuable goodwill when *Campaigns'* viewers were misinformed that defendants "produced" it.

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[33] *Smith* was before this Court on a motion to dismiss. 648 F.2d at 603. Any discussion of harm referred to the injury that results whenever someone takes credit for another's work. *Id.* at 607.

[34] Aside from being non-binding authority, defendants' Second Circuit cases are inapposite because *none* found that defendants engaged in bodily appropriation and misattribution, from which lost advertising value and goodwill flows.